# OVERSIGHT HEARING ON THE BOARD OF VETERANS' APPEALS

## HEARING

BEFORE THE

SUBCOMMITTEE ON
COMPENSATION, PENSION AND INSURANCE

OF THE

## COMMITTEE ON VETERANS' AFFAIRS
## HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

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# OVERSIGHT HEARING ON THE BOARD OF VETERANS' APPEALS

THURSDAY, AUGUST 11, 1988

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE,
COMMITTEE ON VETERANS' AFFAIRS,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 334, Cannon House Office Building, Hon. Douglas Applegate (chairman of the subcommittee) presiding.

Present: Representatives Applegate, McEwen, Wylie, Bilirakis, Smith of New Hampshire, Penny, Johnson, Mica, and Evans.

## OPENING STATEMENT OF CHAIRMAN APPLEGATE

Mr. APPLEGATE. Good morning. We are going to be meeting this morning to review the operation and performance of the Board of Veterans Appeals. Our last oversight hearing on this subject was conducted on October 6, 1987.

We will again hear testimony from the Chairman of the Board, Ken Eaton—it is good to see him here—as well as representatives from several of the veterans' organizations.

We will be addressing issues concerning the timeliness and quality of the appeals process at both the field level and the board level. We will hear a report from the Chairman in response to concerns raised last year on the issue of remands. And, finally we will hear comments on the issues of alleged improprieties at the board and how they are being addressed by the chairman.

These oversight hearings are of great value to us in pinpointing areas where corrective action or other improvements might be warranted. We will certainly be interested to hear what the service organizations have to say in this regard.

Let me say that for the most part the organizations have given the board a pretty good report. I continue to notice that a very large part of any problem that anyone raised with regard to the overall processes, which starts at the field level, is the lack of proper staffing at the regional office level. I can assure you that we will make every effort to insure that no further cuts in staffing are allowed.

I know this is a particular concern of a lot of the service organizations, and I received a letter from Billy Kirby, who is the National Commander of the Disabled American Veterans, with regard to that. He mentioned that the regional offices are faced with funding

deficiencies resulting in veteran beneficiaries not receiving benefits they are entitled to in a timely and efficient manner. So, there obviously is some very strong concern along that line, and we will be talking about those things.

[The prepared statement of Chairman Applegate appears on p. 31.]

Mr. APPLEGATE. Before we begin I would like to recognize the very able vice chairman of the subcommittee, my good friend and colleague from the State of Ohio, Bob McEwen.

## OPENING STATEMENT OF HON. BOB MC EWEN

Mr. MCEWEN. Thank you very much, Mr. Chairman. Again, it is appropriate that you should hold these oversight hearings on the operations on the Board of Veterans Appeals.

I agree with you on the importance for our committee to be diligent in our efforts to ensure this board functions properly, fairly, effectively, and in a timely manner.

Mr. Chairman, our witnesses today will provide our subcommittee with their views concerning the board. Their opinions in this regard are essential ingredients to our oversight process.

If we are to effectively and properly care for America's veterans, our committee must have the benefit of their advice and opinions. Their constructive recommendations are essential, as well. It enables all of us to take stock of where we are and what we are about.

Mr. Chairman, we have seen the results of our previous oversight efforts. As members of the subcommittee will recall, we increased the number of the board members from 50 to 65 during the 98th Congress with the purpose of alleviating the backlog of cases at the Board of Veterans Appeals.

As you know, Mr. Chairman, there is much yet to be done to reduce the number of days to process these appeals. It is important that America's veterans know that we share their concern in this regard, share their desire that each claim receives fair and proper and prompt consideration.

I look forward to the testimony of the witnesses this morning. I join you in welcoming them here today.

Thank you, Mr. Chairman.

[The prepared statement of Congressman McEwen appears on p. 33.]

Mr. APPLEGATE. Thank you very much, Mr. McEwen.

Our first witness this morning is going to be Mr. Ken Eaton, the Chairman of the Board of Veterans Appeals. It is always good to have you here, Ken. Please take a seat up there along with whoever you wish to have join you, and whoever they are, if you would you can introduce them to the committee.

I would like to advise all the witnesses to adhere to a five-minute rule if we can, because I don't know that we have to prolong this hearing, and we will be on time restraints. Of course, if you can summarize your statements you know that entire written statement will be made a part of the printed record.

**STATEMENT OF KENNETH E. EATON, CHAIRMAN, BOARD OF VETERANS APPEALS, VETERANS ADMINISTRATION; ACCOMPANIED BY: ROGER K. BAUER, VICE CHAIRMAN; RICHARD STANDEFER, DEPUTY VICE CHAIRMAN; DAVID LANDERS, DEPUTY VICE CHAIRMAN; AND JOHN H. THOMPSON, GENERAL COUNSEL'S OFFICE**

Mr. EATON. I'd like to introduce first the Vice Chairman of the Board of Veterans Appeals, Roger Bauer. And then on my far left is Deputy Vice Chairman Dick Standefer. On the far right is Deputy Vice Chairman Dave Landers and Jack Thompson from the General Counsel is also here.

As you stated, I do have that prepared statement, and I would just like to make a few remarks in addition to that.

I'm sure everyone is well aware of the fact that every government agency has limited resources available. We try to utilize these resources as efficiently as possible and get the desired blend of quality and productivity in our decisionmaking.

I'd like to emphasize that at the present time we are devoting more of our efforts than ever before to board member review and quality review of our decisions. That will have some impact on the processing time. I don't believe it will be a significant impact, but you can expect some slight increase in processing time because of the additional amount of time we are devoting to board member review and quality review.

We are hiring some additional doctors so that we have all the doctors we need for the board review. We are using senior attorneys more than ever before to help with the board member review, and we are using additional attorneys in the quality review process.

So this resource, of course, has got to be taken out at the other end of the pipeline, so to speak, and you will see a slight increase, I think, in our processing time.

I think it is important to try to make clear the fact that virtually all of these discussions that we have having to do with production and quality and all that sort of thing really have little or nothing to do with the most important factor that we deal with, the bottom line, and that is whether the appeal should be allowed, denied, or remanded. That's what we are all here for—trying to help the veteran as best we can.

And we watch closely to see if any of these things will have an effect in that area because that's what really counts. And it is our opinion—and my opinion personally—that these matters are not directly related to the allowance rate or denial rate or the remand rate.

As a matter of fact, I would like to just bring up one little story that I—well, I think it tells a story, and I think it is important to try to get this sort of thing across. There is a statement made by a retired board member having to do with the emphasis we put on our goals in production. He feels that we should not place this much emphasis on production. He feels that—or at least I believe he's saying—that it's not being fair to the veteran. I'd like to try to emphasize how much I disagree with that, and the way I want to show it is that I have in front of me figures and statistics having to

do with his last four years of service at the board. I think it paints a picture.

It shows that this individual—and he was a chief member of the section. In that section, in 1984, he was meeting the productivity goals. He always worked hard. He worked hard the last four years, and there is no question about that. He was meeting the goals in 1984, and he had an allowance rate of 17½ percent—which is quite high.

Well, then, in 1985 he dropped 300 cases below his goal, and his allowance rate was 12.7 percent.

It dropped significantly. In 1986 it dropped again as far as his production, and his allowance rate was 10.8. And last year—the last year before he retired—he was trying to work these cases, work them hard, polish them up, and do all sorts of things with extra reviews and checks and all sorts of things. His case count dropped again. It was over 400 less than what he did in 1984, and in that last year of 1987 his allowance rate in that section was 9.3 percent.

Now that tells me that the fact that he was going slower and taking more and more time—he felt that it was important that he should have all the time he wanted to do these cases and that he shouldn't have to worry about the goals we set of 40 a week—it sure didn't help the veteran any. As a matter of fact, it seemed to hurt the veteran.

And if all of the sections of the board were to have his philosophy we may have a lower allowance rate and our processing time would be really bad.

So that is just a little story on the side.

Now, there are a lot of things that we can talk about here, but I will, of course, await any questions that you might have.

[The prepared statement of Mr. Eaton appears on p. 36.]

Mr. APPLEGATE. Thank you very much, Ken. I appreciate that.

Just going over my comments earlier I had mentioned the fact that I would like you want to elaborate a little bit more on the issues of remands, which you do bring up and talk about in more detail in your written statement, and also of the alleged improprieties, so to speak. What are you doing as far as that so-called "bonus system" is concerned, and about members signing off for other members?

Mr. EATON. Right. Would you like me to discuss each subject just briefly?

Mr. APPLEGATE. Sure.

Mr. EATON. Let's take the remand situation. In that regard a number of people have raised this question because there was an increase in our remand rate over a period of years there, but I don't think it is alarming. I don't think it is anything to worry about. I think it shows that we were reacting to a situation. There was a need for some more development. There are a few people that say that it had to do with our production needs or something, but that's not true. Our production needs were higher back when our remand rate was a little lower, so that doesn't make any sense to me at all. We had those bonuses all during that time, so that is no good excuse at all.

I think that we are doing a good job on that, and that it reflects that there was some need for additional development during that period.

One of the examples that I think I gave—and this is just one, of course—but PTSD has become an important issue, and it has been developing over a number of years. It has required a lot of development. We have had a very high remand rate in that one area, alone. That sort of thing is a cause for some additional remands.

Mr. APPLEGATE. So really what you're saying, in effect, too, is the fact that the remand isn't so much of a problem as far as the board is concerned; it is more a problem with the regional offices?

Mr. EATON. Yes. I suppose that is true. In that remand report that DVB prepared we had an addendum to it which we really did not quite concur with what they were saying. And I suppose, to some extent, we've got to say that that's part of the cause. There was more development needed in the field, as far as we were concerned, and there wasn't anything else—we didn't think it was that unusual.

As a matter of fact, along that line you will hear from time to time these arguments having to do with—sometimes they say that we are not consistent enough, and other times we are too consistent. I hear it both ways.

Now, here is an example where our remand rate changed, so we, in a sense, were inconsistent with what we were before. Well, that may be a good sign that occasionally we change something a little bit and find something that's different.

So I am not worried about that remand rate, though others seem to be. But our allowance following remand is high—the rate of allowances in the field, I should say, following remand is as high as when the remand rate was lower, and that is a strong indication that there is nothing wrong with our remand rate.

Another item that you brought up was the bonuses. Let me tell you something about that. We've always had bonuses up until this year. We have had them ever since I have been there—27 years we have had them all that time.

You can talk about the good and the bad and whether it is right or not, but I would emphasize one thing for sure: those bonuses do not in any way affect independence, as far as whether the board member is going to allow or deny or remand that case, and that's the important thing. Bonuses have nothing to do with allowances and remands, and if that were true, then I would say there is some more merit to this whole criticism.

Mr. APPLEGATE. It is based mostly on numbers; is that right?

Mr. EATON. Yes.

Mr. APPLEGATE. Wouldn't that mean—if you will excuse me—that you would be giving less time to individual cases, if you guys are asking more of these people in order to increase this production?

Mr. EATON. That's true. You would take less time.

The first thing a board members does is decide whether he is going to allow or deny the appeal —the same thing with an attorney, for that matter. You devote whatever time you need to that, then you take the rest of the time, whatever time you decide you're going to give it, to the preparation of the decision and how long

that takes. That can take two or three hours, or it could take much longer, depending on how much time you're going to put into it.

But it takes the same amount of time to decide whether you're going to allow or deny it—either way. And the example I gave you of that retired board member is a good example of the more time he took it sure didn't help that allowance rate for veterans at all. As a matter of fact, it seemed to go down.

We are stopping the bonuses this year, but it is more because of a technicality. OPM has got a rule having to do with their appraisal system, and we don't have the right—well, I think we had a very good appraisal system, incidentally, to determine outstanding performance, but it doesn't meet their criteria, so we have terminated it. It appears there are a number of people that object to it.

I read in the paper in various places some of these comments that every once in a while they talk about a bonus of $5,000. I've never given a bonus of $5,000. The top bonus last year was $3,660. There were only 8 board members out of 65 that received a bonus, and bonuses ranged from $1,700 to $3,600. There were not very many.

And, incidentally, that—

Mr. APPLEGATE. That's 3,600 cases?

Mr. EATON. No. That's $3,600.

Mr. APPLEGATE. How did they achieve that?

Mr. EATON. One got that, but there were eight board members out of 65 that did receive an award ranging from $1,700 to $3,600—a total of some $20,000 last year.

Mr. APPLEGATE. How did they achieve that?

Mr. EATON. It was based mainly on productivity, but also on their quality, to some extent. Frankly, it varies a little each year. We were trying to factor quality into the equation more, but again I repeat that when I say "quality" it has nothing to do with allowance or denial. We're talking about whether they're dotting the "I's" and including all the details.

Mr. APPLEGATE. Well, I guess it is sort of a moot question.

Mr. EATON. Yes, it is. You're right.

Mr. APPLEGATE. Could you address the other portion of that as far as the signatures and as far as signing off for others?

Mr. EATON. Right. Which is not to be confused with the personal signature list. That was a very minor thing and, in my opinion, we weren't doing anything wrong there at all. We stopped that because we didn't want to get into a further fight in the court on it. But that's a personal signature list.

Incidentally, I got the impression some people thought that if it was on the personal signature list the case would come to me first and I would assign it to a section. That never, never happened. It was only on its way out that I would see it.

Now, having to do with the third reviews, there are always people that are on trips, vacations, travel boards, and that sort of thing, and you have the problem of getting someone to be the third reviewer. You always have at least two board members there, but there is a question of the third review.

What we're doing more and more—and we're really doing it now completely—is the senior attorneys are able to—we're putting more of them on what we call "acting board member staff."

One of the problems is that when the law was passed not so long ago that changed it from 50 to 65 board members, when that law was passed they put in a provision that says that acting board members could only act for nine months out of a year—in effect that is what it says.

Well, we keep very close track of that because we don't want to violate the law, of course. Well, that means in the case of doctors we have a problem because there are any number of doctors that we can't get processed through all the red tape that is necessary to get them appointed to the board, so we have a number of acting board member doctors. It has been a problem as far as when they are on that three-month hiatus and they can't sign. And there has been a little problem on that.

But basically—and we're hiring more doctors to cover that, incidentally. But the big thing that you've got to do is trust these board members. They are good people. We hire competent people, and you can't tell them that they must spend two hours, or you must not spend only 10 minutes or 15 minutes. You've got to let them look at each case, and on the individual case determine how much time they must spend. And if they want to rely, to some extent, on—sometimes they rely heavily on the staffer to prepare the material for them and take very little time for review on it, depending on the circumstances. And other times they don't rely on that staffer at all and they go through every little bit. So it will vary a great deal. But you have got to leave it, to some extent, to them to determine that.

But we have re-emphasized recently in a memo that we want each board member to be sure to take whatever time he or she feels is necessary on that third review.

So that's that.

Was there anything else we were going to touch on?

Mr. APPLEGATE. Well, that's all right at this moment. I do have some other questions; however, I'm going to go ahead and recognize the other members. I may get back to something else.

Mr. McEwen?

Mr. MCEWEN. I need some of your advice. If we find a blatant error, something that we totally disagree with, what is the best way to handle it if we find that something has obviously slipped through the cracks that never should have happened?

Mr. EATON. Well, my advice would be that you—of course, I guess the best thing to do would be to call me and tell me your personal views on it, or you write to me and explain in no uncertain terms that you think we really fouled up and we will call in that case and take another look at it.

Mr. MCEWEN. Thank you.

VVA says in its statement that one of the criticisms of the board in recent years concerns panel members and staff attorneys engaging in informal consultations with the doctors or the physician panel members in order to obtain specific medical information on a case. Could you comment on that?

Mr. EATON. Yes, indeed. We do that all the time, and we are proud of it. We think that that's the way to operate.

If you don't talk around with all your doctors—say we have 21 doctors approximately, and they have their different expertise, but,

in addition, there is different knowledge they have, and one doctor may say he or she is not quite comfortable with a problem and will want to check with a couple of other doctors. We encourage them to do that. The same is true with an attorney who is preparing the decision in advance—one of the consultants. We encourage him to talk to a doctor if he has got a problem with how he is going to tentatively prepare the case.

Mr. MCEWEN. Is that included in the decision that this went on?

Mr. EATON. No. And that is their criticism. But I don't—in my opinion, it is not valid. I believe that in-house, within the board, it is perfectly proper to go around and get information from different people, just like the lawyers do among themselves. One lawyer is preparing a decision, and he might think there are several things he is not quite so sure about how to handle, and he will go down the hall to talk to somebody else and they will chat back and forth. Of course you don't report that, but for some reason they think that with the doctors that you should. We don't consider that evidence.

Mr. MCEWEN. What are the medical specialties that physicians in the board handling post traumatic stress disorder cases have?

Mr. EATON. We have, I believe, six sections that have PTSD jurisdiction. I would have to supply for the record their individual qualifications.

[Subsequently, the Veterans Administration furnished the following information:]

PHYSICIANS OF PTSD SECTIONS AND RESPECTIVE MEDICAL SPECIALTIES AS OF AUGUST 11, 1988

*Section 10*
C. E. Edwards, M.D.—Neurology

*Section 13*
Charles W. Humphreys, Jr., M.D.—Internal Medicine, Industrial/Occupational Medicine

*Section 16*
Howard A. Donald, M.D.—Obstetrics/Gynecology, Endocrinology

*Section 19*
Harold H. Sterling, M.D.—Internal Medicine, EKG Interpretation

*Section 21*
Jose R. Salcedo, M.D.—Internal Medicine
Consulting Psychiatrist on BVA Staff
Eugene M. Caffey, Jr., M.D.

Mr. MCEWEN. Right off the top of your head they are not psychiatrists. Is that a deliberate decision?

Mr. EATON. No. We don't have a psychiatrist as a board member. They are a little hard to find to make board members.

We do have a part-time psychiatrist for advice, and he does see many of these PTSD cases. But we do not have a psychiatrist on the board.

Mr. MCEWEN. Do you think it would be helpful to have one?

Mr. EATON. On the board as opposed to a consultant for advice? Well, you couldn't have six of them. We have six sections.

What we do is to have available for advice, in addition to our psychiatrist, the independent medical expert opinions, we have the Chief Medical Director's Office for psychiatric advice. So we have a lot of that sort of expertise available.

Mr. McEWEN. But you don't see any need?

Mr. EATON. I would be very favorably inclined if I could find a psychiatrist that I could get on the board. Absolutely.

Mr. McEWEN. So that is a priority when you're looking to try to—

Mr. EATON. It is now.

Mr. McEWEN. Thank you, sir.

[Laughter.]

Mr. McEWEN. Does BVA keep statistics on the number of appeals in which the various veterans service organizations represent veterans?

Mr. EATON. Yes.

Mr. McEWEN. Would you have any objection to sharing that with the committee?

Mr. EATON. Well, I just happen to have one that we just prepared the other day. It is just being released. Now, we could provide for the record and submit it later. This one happens to be for the last three quarters of this year. I don't think you want me to read through all of this, or do you?

Mr. McEWEN. Can you do it in 60 seconds?

Mr. EATON. Well, there is a lot of material on here, but let me start by just saying—

Mr. McEWEN. I suppose by each organization.

Mr. EATON. Okay. Right. There is a lot of material in here. Of all the cases, 13.6 percent are handled by the American Legion; 3.1 percent are handled by AMVETS, 1.1 percent, American Red Cross; 44.6 percent, Disabled American Veterans; 0.3 percent, Jewish War Veterans; 1.3 percent, Military Order of the Purple Heart; 2.6 percent, Paralyzed Veterans of America; 10 percent, VFW; 9.9 percent, State service organizations; 1.7 percent, attorneys; 0.1 percent, agents; 0.1 percent, Vietnam Veterans of America; other representation, 0.9 percent; no representation, 10.7 percent.

Mr. McEWEN. Give this to me again. VFW is what percent?

Mr. EATON. That is 10 percent.

Mr. McEWEN. Ten? And DAV?

Mr. EATON. DAV is 44.6.

Mr. McEWEN. American Legion?

Mr. EATON. Is 13.6.

Mr. McEWEN. Okay. What about Congress—.000001?

You don't have that down?

Mr. EATON. Other is 0.9.

Mr. McEWEN. We're others? Okay, I've got you.

Thank you very much. I have no further questions.

Mr. APPLEGATE. Thank you, Mr. McEwen.

Mr. Evans?

Mr. EVANS. Thank you, Mr. Chairman.

Mr. Eaton, in your statement you indicate that the personal signature list contained the names of members of both House and Senate Veterans' Affairs Committees, as well as a few other Members of Congress who have expressed an interest in veterans' matters. In fact, it does not include all the members of the House and Senate Veterans' Affairs Committees—at least in the March 9, 1987, list that I have. It did include some of the most prominent

veterans' advocates on our committee, and our former members—the Speaker of the House.

But these folks, besides the members, had expressed an interest in veterans' matters. Could you tell me just how Mark Hatfield and Denny Smith, for example, who are not members of this committee or the Senate committee, had express that interest?

Mr. EATON. Isn't Mr. Smith a member of the committee? But still your point—I understand your point. I think it was a situation about two or three years ago where Senator Hatfield had seemed to express a lot of interest, and I thought that it would be interesting to see where he was coming from.

You see, I don't ordinarily see these cases if I don't get them on this personal signature list, and that was the idea that I had in mind. And, unfortunately, in that particular situation I probably should have taken him off after the one year in which I thought I was interested in what he was interested in, if you follow what I'm saying. And then it just continued on for a couple of years after that.

Mr. EVANS. All right. Now, you are indicating that in your opinion the establishment or the existence of a list did not result in any preferential treatment; yet, in your statement you said that in the course of signing the letters of transmittal that you always check the decision contents for any errors.

Mr. EATON. Yes.

Mr. EVANS. Now, would that be errors in terms of grammar, punctuation, or an actual decision, itself?

Mr. EATON. No. I don't believe I have ever taken a case and said they should have allowed this instead of denying it, or denying it instead of allowing it and sent it back to them and told them to change the decision. I would never do that.

Now, I might, on occasion—and this would be rare, but it could happen where I look at a case and I don't feel that the explanation of the reasoning in it is satisfactory to go to Sonny Montgomery, for example—that it's a little skimpy. And I might send it back and say I think they ought to do a better job in explaining their position.

Mr. EVANS. Well, just what impact, if not in your direct correction of these errors, but just in the—this went out to all members of the board of the Board of Veterans Appeals?

Mr. EATON. No, no. It didn't work like that at all.

Mr. EVANS. Again, I'm talking about the personal signature list. Who did that go to?

Mr. EATON. Actually, that goes to a clerk downstairs that, when they're getting ready to dispatch the case, they have a list in front of them, and if the Congressman or Senator is on that list it is sent up to me before it is dispatched.

Mr. EVANS. This is not distributed to people evaluating cases?

Mr. EATON. Yes and no. It is not distributed to them for any purpose, but if they want to they can look it up in the manual and see that it is there.

Mr. EVANS. And it is generally known that it is there?

Mr. EATON. Well, I would say that it is generally not, but I know I'm being argumentative.

Mr. EVANS. Okay.

Mr. EATON. I don't believe the average board member could care less about that thing, so I don't think it is generally known.

Mr. EVANS. But for anyone who would know, the fact that you would be reviewing a decision to give it whatever additional layer of review for whatever reason, wouldn't it have some impact on those individual members?

Mr. EATON. I would hope so. I would think that they would write a better decision because of it. I don't think it would have an impact on whether they were going to allow it or deny it, though. I would be surprised.

Mr. EVANS. I just talked to some people in the legal practice who have felt that that would have a tremendous impact, in their opinion, just reviewing it for some people that I know.

And while you can contend that there isn't any preferential treatment in the way you review the case, I think existence of the list, itself, indicating that cases that receive letters from these individual Members of Congress who are all advocates for veterans—no doubt about it—certainly gives them some higher level of review, for whatever reason, than veterans in my own district get.

Mr. EATON. Apparently there are others who agree with you. We had never looked at it that way.

This list has been in existence for 30 years, at least. I certainly didn't start it. And I have discontinued it, incidentally.

Mr. EVANS. All right. Could we get, for the benefit of the committee, the—first, I would like—the list that I have is dated March 9, 1987, and the recision section says that this is automatically rescinded December 31, 1987. Was there a 1988 list?

Mr. EATON. I believe there was. I'd have to check. But it has been rescinded now.

Mr. EVANS. All right. I'd like to get both the 1988 list and whatever memo was sent out to rescind that list if you could supply that information to us.

Mr. EATON. I would be happy to submit that for the record.

[The information appears on p. 44]

Mr. EVANS. All right. And I would also like to go on record that those of us on the Veterans' Committee have a special interest in veterans.

Now, going to the issue of courtesy signatures: in your declaration filed in the BVA lawsuit you stated that courtesy signatures occur only in absences in sections due to vacations, illnesses, etc.

Mr. EATON. I would object to that. I don't think I said that.

Mr. EVANS. All right. What did you say?

Mr. EATON. Well, I'll have to look at what it is, but I can't believe I ever said—

Mr. EVANS. Let me just ask you when they do occur.

Mr. EATON. They do not occur.

Mr. EVANS. They do not occur?

Mr. EATON. No, in my opinion they do not occur. We do not encourage any—first you have to have a definition of what a courtesy signature is.

Mr. EVANS. Well, Daniel Bierman, in his affidavit, says that these courtesy signatures are common. Were you ever aware that board members were signing decisions without reviewing any part of the administrative record, whatsoever?

Mr. EATON. We have always, always encouraged them to do what is necessary to review that case. There are no—it can vary a great deal as to the length of time. It could be just a few minutes on occasion, but normally it would be much more than that. I cannot state categorically that there hasn't been a situation where a person signed a decision without reviewing it.

Mr. EVANS. Well, also in the lawsuit there is a memorandum from Phil Wright dated August 11, 1986, that indicates that board members were signing decisions without reviewing really any part of the record at all. And your response to that in a memorandum of 8/11/86 was to the effect that you would prefer to let each section operate as they think best unless the member of the section objects. I believe that is in direct——

Mr. EATON. Right.

Mr. EVANS (Continuing.) Response to Phil Wright's——

Mr. EATON. That's right.

Mr. EVANS (Continuing.) Concern about what I have called, for shorthand basis, courtesy signatures.

Mr. EATON. Well, you have to take that in context.

Mr. Wright was talking about what he thought might be happening in another section. He wasn't talking about his own section; he was talking about rumors of another section, and, in effect, what I was trying to tell him was that if I hear that that is happening and somebody in that section tells me that that is what is going on, I will do something about it, but that I am not going to do it based on your telling about somebody else doing it. Unless he gets specific—

Mr. EVANS. You didn't think it merited looking into that you have—I'm not sure exactly if his position—this is a memo from one of your employees alleging that this is happening, and you are saying that it is dismissable on the basis of the fact that one of your employees is raising, and that unless you hear it from other sources you are not going to act on it? You're going to let other sections basically run themselves as they wish?

Mr. EATON. We do pretty much let the sections operate independently as to how they review the case.

Mr. EVANS. You gave no credibility then, whatsoever, to Phil Wright's allegations? It didn't cause you some concern that maybe in some sections, according to rumor—and we are dealing maybe with only an allegation, I realize, but an allegation that someone is sending you a memorandum about, and that you're dismissing saying, basically, let these sections operate as they think best unless a member of the section objects? Someone in that section would have to object, but may have been part of this going on? Is that a way to deal with that kind of allegation?

It is a serious allegation, it seems to me. I don't know if it was or wasn't unfounded. I can't say to you that I have proof that it was. Certainly it seems serious to me.

Mr. EATON. I was trying to keep a closer eye on those people because of that, but I wasn't going to tell Mr. Wright that or give him that satisfaction, if you want to know the truth of the matter.

Mr. EVANS. I have more questions. I don't want to take—you have this second round, and I would be glad to wait, Mr. Chairman.

Mr. APPLEGATE. Well, we're going to be pressed for time. I am going to submit my questions for the record.

Mr. EVANS. All right. Let me, if I could, Mr. Chairman—and I will try to be very brief—jumping again to another area, if I might.

Mr. Eaton, I understand that the Federal Government's employees are usually subject for promotion and pay increases to the performance appraisal system and the merit pay system under title five.

But isn't it true that the BVA has received in the past Executive Branch exemptions, in 1982 and 1985 respectively, so that decisions aren't made on the basis of pay and bonuses, and that there is no appearance of that occurring?

Mr. EATON. If you—I believe that what that was intended to do was to make the board independent so that—what had happened was that there was a situation having to do with what they called the merit pay arrangement, and the board members were concerned that if they were evaluated under a regular appraisal system under merit pay that the Chairman or Vice Chairman might look at the way they were deciding decisions—I believe, incidentally, that that was an unfounded concern on their part. We've never done any evaluation or consideration on the basis of whether they're allowing or denying claims.

But, at any rate, that's what they felt. And that's why they asked for this—to get out of the merit pay. In none of our minds did we think that that had to do with bonuses, as opposed to—because the bonuses don't have to do with the independence of the board member.

Now, I don't believe there is any board member—even my critics on the board—that would suggest that the bonuses in any way affected their independence.

Mr. EVANS. All right, Mr. Chairman. Thank you for your time. I yield back now to you.

Mr. APPLEGATE. If you wish to submit other questions—

Mr. EVANS. I do have some other questions. Thank you.

Mr. APPLEGATE. Okay. Well, I had some other questions too, Ken, but I'm going to mail those to you and ask you to respond rather than take the time here.

We appreciate your coming with your staff to answer some of the questions of concern, and we will continue to look into all of these and into the board's action and all. As the time goes on we will be holding these oversight hearings periodically.

Mr. McEwen?

Mr. MCEWEN. Thank you, Mr. Chairman.

Could you submit that chart that you read from for the record?

Mr. EATON. I could do that right now.

[The information appears on p. 43]

Mr. MCEWEN. And, secondly, about this list that has existed for 30 years in which the Chairman reviewed decisions that went to members of the Veterans' Affairs Committee, I think that's an excellent procedure. I think it is appropriate. Every department does that when they have areas of jurisdiction. In fact, in most cases it is public.

If you go to the Pentagon and you ask what the priority list is for requests for aircraft they will tell you Defense Appropriations

Subcommittee, Armed Services, and they go right down the list, and, very simply, everybody knows how they operate. And committees of jurisdiction are areas in which they deal most directly. And, quite frankly, members of the Veterans' Affairs Committee are probably held to a higher standard in helping veterans then are other Members of Congress.

Mr. EVANS. Would the gentleman yield?

Mr. MCEWEN. And when they come to members of the Veterans' Affairs Committee and ask for help they operate under the presumption that members of the Veterans' Affairs Committee have a working relationship with the Veterans' Administration such that it will not get merely routine. It doesn't slight anyone; it just is the customary response of which Members of Congress also deal——

Mr. EVANS. Would the gentleman yield?

Mr. MCEWEN (Continuing.) With legislation. Sure.

Mr. EVANS. Knowing of his advocacy for veterans on this committee as the ranking minority member on this subcommittee and a prominent member, I'm sure you would like to be added to that list, as I would be.

Mr. MCEWEN. As I understand it, all members of the committee are included.

Mr. EVANS. No. Not in the 1987 one.

Mr. EATON. No, I'm afraid they're not all on it. I have the 1987 list, and—

Mr. MCEWEN. Generally, I understood that the BVA has always maintained a personal signature list. This list contains the names of members of both the House and Senate Veterans' Affairs Committee, as well as a few other Members of Congress who have expressed an interest.

Mr. EVANS. And if I could point out to the gentleman from Ohio, on the 1987 list you are not listed, and neither am I and several other members. That is what I was trying to say.

Mr. APPLEGATE. Let's just have Mr. Eaton answer the question and he can settle that.

Mr. EATON. As a matter of fact, I remember some six years ago—just before I became Chairman—Sid Shuman decided he was going to put them all on the list, and we started getting a number of cases in the front office that you wouldn't believe. We just couldn't handle it.

We wanted to get the pulse and get a feel of what was going on, but we couldn't handle the volume for that many.

Mr. MCEWEN. So you don't have members of the Veterans' Affairs Committee?

Mr. EATON. Yes. We have members, but not all of them.

Mr. MCEWEN. Well, that's an awful list, I tell you.

[Laughter.]

Mr. EVANS. I thought the gentleman would think so.

Mr. APPLEGATE. Would you like that to be amended?

[No response.]

Mr. APPLEGATE. Okay. Again, thank you very much, Ken.

Our first panel today will consist of representatives from the VFW, the PVA, and the American Ex-Prisoners of War. If each of you will come up to the table we can get started on your testimony.

While they are coming up, we, on the committee, have learned that one of our good friends from the VFW, Gordon Thorson, will be leaving the Washington area to become an assistant to the adjutant at the VFW's national headquarters in Kansas City.

As we on the committee can attest, Gordon, you've been one of the most effective advocates for veterans on the Hill. We all have—including the staff—thoroughly enjoyed working with you, and want to say that the Washington office is losing a good man. So we certainly wish you all the best in the world. I understand that your son is also here in the audience, and I know that he is very proud of you, as you are of him. It is nice to have him here today, too.

Mr. THORSON. Thank you, Mr. Chairman, for your generous remarks. I have enjoyed working with the committee and your entire excellent staff, and you personally, sir. I appreciate, again, the nice comments you have made. I look forward to again working with this committee perhaps some time in the future. You can bet that we will meet again.

Mr. APPLEGATE. Well, we'll look forward to having you back. With that we'll just let you start off today as the lead witness.

## STATEMENT OF GORDON R. THORSON, SPECIAL ASSISTANT, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS

Mr. THORSON. Mr. Chairman and members of the subcommittee, as always, the Veterans of Foreign Wars would like to thank you for scheduling this important oversight hearing.

The Board of Veterans Appeals is charged with the responsibility of ensuring that the veterans of this nation are given a fair, equitable, and just decision under the laws and regulations governing the operations of the Veterans' Administration.

As a representative of the Veterans of Foreign Wars I am proud to be here today to express the opinion of our organization. As you know, the VFW has a growing membership of over 2.2 million men and women, and we are proud to say that much of this continual growth is a result of active participation by Vietnam veterans.

Though the majority of our membership is currently made up of World War I, World War II, and Korean veterans, many in-country, combat Vietnam veterans have become very active in our organization. In fact, over one-half million combat Vietnam veterans belong to the Veterans of Foreign Wars and have joined their comrades from earlier years in supporting our continual efforts to serve the veterans of America and preserve, protect, and improve benefit and entitlement programs administered by the Veterans' Administration.

The Board of Veterans Appeals and its chairman are currently under attack by those who wish to discredit, demean, and ultimately destroy the current system of adjudicating veterans' claims. The VFW and the veterans we represent will have no part in this destruction.

VFW is becoming a little tired of listening to headline-hunting groups berating the Board of Veterans Appeals with no real hands-on, working knowledge of the system they strive to destroy.

The VFW is not a small, litigious organization led by frustrated lawyers prone to engage in nuisance lawsuits. We would not make

allegations of wrong-doing without first substantiating and sharing the evidence with this subcommittee first-hand.

The VFW is a hard-working organization dedicated to serving veterans and improving services provided by the Veterans' Administration. Perhaps it is time to require full participation by veterans' organizations in the DVB–BVA appeals process to establish some level of credibility before appearing in front of this distinguished subcommittee and giving testimony.

Our written testimony has already been provided and gives an overview of our extensive efforts to serve the veterans of this nation, promote a better understanding of the Veterans' Administration, and, most importantly, to continually improve existing adjudication processes.

In preparing for this testimony we took a good, hard look at the BVA and statistics covering their operations. After considering the level of staffing and the large number of cases advanced each year for consideration it becomes obvious that the BVA is making good use of its limited resources in making decisions in a timely manner.

The VFW is satisfied that the chairman and board members are continually striving to improve the quality of their decisions. Our VFW appeals staff stationed at the Board of Veterans Appeals report that decisions rendered by the BVA are steadily improving in quality and contain very complete and detailed explanations for reasons for their decisions.

We do have two concerns, however, relating to the staffing and operations of the Board of Veterans Appeals.

First of all, we firmly believe that additional support staff is needed to help move cases more effectively and efficiently through the entire adjudication process. We do realize that, because of budget constraints, inadequate support staff is a common problem shared with VA regional office adjudication divisions throughout this country.

Our second concern has been discussed many times before this very subcommittee. We maintain that the Board of Veterans Appeals should be consolidated under one roof. Currently, seven sections—or one-third of the entire Board of Veterans Appeals—is to be located in a separate building three blocks away from their headquarters. This is unacceptable to the Veterans of Foreign Wars inasmuch as we feel this separation causes a duplication of services, disassociation with the main body of the board, and causes many communications and control problems.

If the board cannot be consolidated into the headquarters location, then perhaps it is time to move the remaining 14 board sections into a location that is sufficient to handle all 21 board sections.

Again, thank you for inviting the Veterans of Foreign Wars to present testimony before this important subcommittee. You can be sure that we will continue to actively represent the veterans of this nation in a positive manner, and ensure that the benefits entitlements we have earned are preserved and protected.

Thank you, sir.

[The prepared statement of Mr. Thorson appears on p. 47.]

Mr. APPLEGATE. Thank you very much, Gordon.

Next we have Mr. Charles Williams of the American Ex-Prisoners of War.

## STATEMENT OF CHARLES M. WILLIAMS, EXECUTIVE DIRECTOR, AMERICAN EX-PRISONERS OF WAR

Mr. WILLIAMS. Thank you, Mr. Chairman and distinguished members of the committee.

On behalf of the 30,000 members of the American Ex-Prisoners of War, and the 75,000 former prisoners of war that we represent, I want to assure you that the quality and the timeliness of services provided by the Board of Veterans Appeals are not only of vital concern, but they continue to be thorns in the side of the former prisoners of war.

We have seen very little improvement since 97-37 became law in 1981. As you know, that landmark legislation was in response to facts generated, to a considerable degree, by VA's own excellent 1980 report. It documented that long-term health consequences would frequently occur, and that POW's invariably lacked adequate service records concerning injuries and illnesses suffered during confinement.

The practical problems of POW's obtaining fair and equitable resolution of their legitimate claims were recognized by Congress, which sought then, and via later legislation, to correct. The POW Advisory Committee established by that legislation has repeatedly affirmed that the adjudication procedure, as implemented, is not effective for many deserving POW's.

The sad part of all of this is that the VA does not recognize or admit that there is a problem. Unfortunately, it starts in the region with a faulty adjudication, and is compounded by BVA when it denies an appeal to correct a flawed initial rating.

The Veterans' Administration opposed the addition of anxiety states in what was later to become 97-37, and has either opposed or not supported the addition of residuals of frostbite, traumatic arthritis, peripheral neuropathy, ulcers, and spastic colon—all conditions occurring at a higher rate within the POW's we represent.

Mr. Chairman, I'm going to leave the balance of this statement stand. I do want to make one statement that we have seen, I think, within the last year, a great improvement in the attitude of the people in the Board of Veterans Appeals that we have had occasion to talk to.

We seem to be getting the feeling that what the problem with many of the prisoner of war claims is the fact that it is something that you can't see. And it is a situation where we feel that the Board of Veterans Appeals just does not understand the whole problem and the results that come out of that prison confinement. We believe that is where our problem lies. It is not that we have a broken leg, a leg off, an arm off—something they can see and evaluate and do very nicely with. But we have seen a general improvement in the last year. I believe the problem has been, as I say, a lack of understanding.

Thank you very much.

[The prepared statement of Mr. Williams appears on p. 51.]

Mr. APPLEGATE. Thank you very much, Charlie.

Mr. John Bollinger, representing the PVA.

## STATEMENT OF JOHN C. BOLLINGER, ASSOCIATE LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

Mr. BOLLINGER. Chairman Applegate and members of this subcommittee, as always it is a real pleasure for me to be here today to present the views of the Paralyzed Veterans of America. On behalf of our members, I wish to thank you for conducting this important oversight hearing on the operation of the Board of Veterans Appeals.

It is clear that oversight examination and evaluation of the BVA is essential. As the final authority on all VA claims, the board is ultimately responsible for ensuring that all VA benefits authorized by law are properly granted. The efforts of this subcommittee to examine and evaluate the operation of the BVA will help to ensure that such claims receive complete and just review.

PVA's ability to offer credible testimony today is due, in large part, to our own on-going oversight capacity regarding the Board of Veterans Appeals. Our Veterans' Benefits Department includes 84 professionally-trained service officers who are working daily for veterans by representing them before the VA at both the regional office and the BVA level.

By working with the veteran and the VA we are able to closely monitor both the quantity of claims and the VA's ability to adjudicate those claims in a prompt way.

I initially wish to discuss several recent actions taken by the BVA involving management techniques and operations. First of all, we congratulate Chairman Ken Eaton for recognizing and addressing the controversial issues of bonuses and production quotas, the chairman's signature list, and courtesy signatures.

With respect to bonuses, quotas, and the signature list, PVA believes such practices may, indeed, have been perceived in a negative manner. The important thing is that we do not believe that such practices actually compromised the quality of work at BVA.

With respect to courtesy signatures or third reviews, PVA recognizes the possible need for a board member, not originally assigned to a case, to sign his or her name to a final decision. PVA feels very strongly that third reviews should entail a good understanding of the evidence, the facts, and disposition of a case before a third signature is affixed to the final decision, and we encourage Chairman Eaton to enforce his memorandum of May, 1988, regarding the necessary and appropriate time needed to review cases.

Over the years, PVA has found the VA's claims and appellate process to be basically equitable and just. For the most part we believe the system does work. This is not to say, however, that the timeliness and quality of the adjudication and appeals process at both the field stations and BVA levels could not be improved.

Averaging over 40,000 cases per year for the last five years, the BVA now reports a response time of approximately 130 days from the time a case is received until a final decision is achieved. We believe this is a reasonable length of time for the board to review a case without compromising quality standards. We are very concerned, however, with the overall elapsed processing time from the

point of the Notice of Disagreement until the BVA's final decision. This, of course, reflects the inability of DVB to adequately meet basic quality and timeliness standards during the appellate process.

Far too many administrative errors resulting in time-consuming remands are being made. As you know, approximately 20 percent of all cases are returned to regional offices for corrective and additional action. Although we believe that remands generally operate to the benefit of individual claimants and reflect full due process, regional office errors, both substantive and procedural, have a significant adverse effect on timeliness as it pertains to the whole appellate process.

As we have testified in the past, BVA and RO quality and timeliness issues are directly related to staffing requirements. One of the criticisms aimed at the board in recent years concerns panel members and staff attorneys engaging in informal consultations with physician panel members in order to obtain specific medical information on a case.

We believe part of the answer here, Mr. Chairman, would be several additional medical advisors accessible to all panel members. We believe this would relieve a great deal of this criticism. Such consultations could then be reflected in the decision opinion without overburdening existing medical staff.

The necessity of including such consultations is especially important when the board's decision is based strictly on medical issues and not legal ones.

PVA appreciates the action of the subcommittee in rejecting the Administration's proposed staffing cuts. We applaud your concern for the VA's appellate process in holding this oversight hearing. We are hopeful that our collective efforts today will result in an improved Board of Veterans Appeals.

Thank you very much.

[The prepared statement of Mr. Bollinger appears on p. 56.]

Mr. APPLEGATE. Thank you very much, John.

Mr. Vice-Chairman, do you have anything that you would like to say?

Mr. MCEWEN. Yes, if I may.

Mr. APPLEGATE. Yes. Go right ahead.

Mr. MCEWEN. Thank you, Mr. Chairman.

I would echo and associate myself with the remarks that you have made regarding Mr. Thorson's change in position, and wish him well. And we thank him for his forthright testimony.

I would thank you, Mr. Williams, also, for your testimony. You made reference to the change in attitude in recent months. Can you elaborate on that? What do you think precipitated it? And how do you categorize the changes that have been made in attitude at the board?

Mr. WILLIAMS. Mr. McEwen, I don't think this is something that I can put my finger on. It is an attitude matter more than anything else, but it has been an attitude of cooperation that we seem to have felt that we didn't feel before. And, as I said, this has been within the last year or so. But there has been a general feeling that they want to do the thing and do it right.

Mr. MCEWEN. You don't credit it to any person or thing?

Mr. WILLIAMS. Sir?

Mr. McEWEN. You don't credit it to a particular person or thing?

Mr. WILLIAMS. I do not, sir. I credit it to something that I have seen happening in the Board of Veterans Appeals. I've seen it happening in the Department of Medicine and Science. Both areas have seemed to do a much better job as far as trying to do the right thing.

Mr. MCEWEN. Thank you.

Mr. Williams, you made several suggestions which I think are very, very helpful. One of the things that any of us who have dealt with the management of government for a long time have recognized is the frustration that comes from the total inability to reward good workers. A teacher that has third graders that graduate each year that can read and the teacher across the hall that graduates third graders that can't read both get the same salary, and the same increase the next year and our teachers are all judged blanket, and there is no way to seemingly reward those that teach well as opposed to those that don't teach well, and the superintendent has an inability to—and labor organizations are strongly opposed to crediting the good teachers. That applies in virtually every area of government.

If you have someone who is working hard and diligently and well and then the supervisor, as opposed to the person who is lagging behind and who is not working so incapably that they could be dismissed, but there is just frustration on the part of government managers to reward good work.

How do we deal with that and keep morale up and reward strong effort and, thereby, benefit those who are seeking to serve if we deny flexibility to managers?

Mr. BOLLINGER. Is this question directed at me, sir?

Mr. MCEWEN. Yes.

Mr. BOLLINGER. Well, first of all, PVA would want to emphasize that, again, production quotas have not, in our opinion, compromised the quality of work at the Board of Veterans Appeals. I believe one must determine to what degree perceived negative attitudes towards these management techniques affects the board.

And, in our opinion, we felt it was proper that Mr. Eaton did discontinue this practice, because we felt that many people did observe this management technique as adversely affecting the quality of work.

In terms of what we can do to make up for the lack of bonuses, I don't know whether the Board of Veterans Appeals could get into something like a merit pay system. I don't know what OPM policies are in that regard, but I certainly think that they ought to have something. Across the board salary increases would be helpful.

Mr. MCEWEN. Is it your understanding that raising the level does not do it. If I have got somebody sitting beside me at a desk that is taking smoke breaks every hour and ten minutes for 20 minutes, and I'm working there diligently every day, raising that person's salary does not motivate me.

Mr. BOLLINGER. I understand.

Mr. MCEWEN. But nevertheless, thank you.

Mr. THORSON. Yes. VFW agrees with Mr. Bollinger. There has to be some way for Mr. Eaton to motivate his people to perform a little better.

Mr. MCEWEN. The NEA says that we should pay the teacher that can't teach more money. That's their solution. It just doesn't get the job done.

Mr. THORSON. I agree with what you are saying.

Mr. MCEWEN. Thank you very much.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you very much, Mr. McEwen.

Mr. Lane Evans?

Mr. EVANS. Thank you, Mr. Chairman.

On June 9th before the Senate Veterans' Affairs Committee, Mr. Eaton stated that numbers of cases to be heard before travel boards are allocated to the veterans service organizations, so I thought I'd survey you three here, at least, and ask how many of you get allocated for your respective organization for travel board cases. Do you know right off hand?

Mr. THORSON. Well, I'll try to answer that question, Mr. Evans. I used to work as a department service officer back in Fargo, North Dakota, at that regional office.

As far as actual numbers that are allocated to each veterans' service organization, I don't remember that there was any set allocation. What would typically happen, sir, is—I think it was each April in Fargo—we would know the travelling board was coming through, and they would be there perhaps for one day.

Knowing this, they could only see four or six cases that particular day. It was announced to any active organization, or any organization that actually pursues cases with that regional office, that there would be six cases presented, and on a first-come, first-served basis we could present one of our cases.

Does that help you?

Mr. EVANS. That helps me. But then, given that, let me ask you: Is there a notion that the travelling boards are generally more generous in terms of higher allowance rates?

Mr. THORSON. No. There is a misconception there. What actually happens is that—again, to put myself back as a service officer—I would have an opportunity to present a case. I'd look at my cases and I'd see which one of those cases has the best shot. I'd take that case and I'd present that case. And that is typically how all service officers do their job when they are to face the travelling board. They want to put their best foot forward, so they are going to present their best case.

Well, as a consequence of that, of course, the travelling board allowance rate is going to be higher because they are going to be seeing your best cases.

Mr. EVANS. That's a tough decision—almost like working in a M.A.S.H. unit at times, I suppose, in terms of trying to decide which case you're going to present. How do you do that? It seems to me that, according to my information, the veteran, himself, on form 19 is not given any notice among the other options that a veteran has that a hearing before a travelling board is even an option that that veteran has. So it is basically something that the veter-

ans' service organization officer working with the case officer working decides himself; is that correct?

Mr. THORSON. Well, as far as an option a veteran has an option to personally present his case to the Board of Veterans Appeals. But on the travelling board he doesn't. That isn't something that is typically offered to all veterans.

Mr. EVANS. No. But it at least is an option that is offered to some veterans. I guess my kind of feeling is that it is unfair when certain veterans are unaware of the possibility even of a travelling board.

I'm not attacking any veterans' service organization trying to work within the system, but what we have, really, is another system of justice for those persons who might have a good case but also are going through a veterans' service organization. Maybe an unrepresented veteran who doesn't belong to a service organization or who hasn't had contact with one of them is not even aware that there are travelling boards. It is not an option that is on the form.

So I appreciate what you're trying to do within the circumstances, but it is, in a sense, in that individual officer's discretion, you might say, to make that decision. It is not really an option that a veteran, himself, is aware of.

Mr. THORSON. Perhaps not. I'm not sure exactly how a travelling board agenda is announced throughout the country. Maybe you're advocating that it should be announced—should we increase the number of travelling boards? Is that—

Mr. EVANS. I'm not necessarily even attacking the system the way it is. I'm just saying that this is not generally well known to the veteran, himself. It is better known for veteran service officers.

Mr. THORSON. Yes. I can agree with that. Yes, sir, it is.

Mr. EVANS. If I can just ask for any general comments from the two witnesses.

Mr. BOLLINGER. Mr. Evans, I would just like to say that I agree with that. Every veteran should known what every other veteran knows or every veterans' representative knows about travelling boards. The problem is, of course, as we all know, that the BVA doesn't have resources to accommodate all those hearings. It's just that simple.

In order for them to provide traveling board hearings to every individual who would want one, you'd have to expand the board by great numbers.

Mr. EVANS. So is your organization's service officers out there in the same position where they have to choose?

Mr. BOLLINGER. To a degree. I'm not aware of any formal allocation of a number of cases that PVA is limited to at any given travel board. My understanding is that it is worked out informally between the adjudication people and the different VSO's at that regional office. And, to the best of my knowledge, in 99 percent of the cases it is done in an agreeable way and everybody is reasonably pleased.

Mr. EVANS. All right. Well I may not be correctly concisely stating how that works, but I'm just going to the general notion. That's one of the questions I'm directing by writing to Mr. Eaton.

If I could just ask Mr. Williams if he has any response, and then I will give it back.

Mr. WILLIAMS. I am not as familiar with the claim process in the field as I should be, Mr. Evans. I don't know how they are selected, and I don't know how the distribution is made. So I'll decline on that, if I may.

Mr. EVANS. Could you tell us in writing how many cases your organization has had before a travelling board in the last year?

Mr. WILLIAMS. I'll get that information for you, Mr. Evans.

Mr. EVANS. I'd appreciate it, Mr. Williams.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Mr. Evans.

Gentlemen, thank you again for appearing before the committee.

Mr. BOLLINGER. Mr. Chairman, if I may just quickly say——

Mr. APPLEGATE. Yes.

Mr. BOLLINGER (Continuing.) That we also congratulate Gordon. We wish him well. He has been a colleague, a good friend, and a true advocate of veterans. We appreciate our association with him.

Mr. MCEWEN. We'd like to add our voices to that, too, if we may. I know you're ready to dismiss the panel. Just in 30 seconds, Senator Murkowski has introduced a bill to separate BVA a little bit from the VA and make it semi-autonomous. Have any of you looked at that or have a position on that legislation?

Mr. BOLLINGER. Yes, sir. We reviewed it. I'm not sure I'm prepared to go into an analysis of it right now, but we certainly plan to on September 8 for the full committee, sir.

Mr. MCEWEN. Gordon?

Mr. THORSON. That's exactly—we have reviewed it, and we will discuss it on September 8.

Mr. APPLEGATE. Good question. Thanks, again.

The next panel consists of: Rick Schultz, Associate National Legislative Director of the DAV; Dick O'Dell, Vice President and Chairman of VVA's Committee on Advocacy, Mr. Paul Egan; and Mr. Sam Walsh, Assistant Director of National Legislative Commission, and Phil Wilkerson, both with the American Legion.

It is good to have you here this morning again. Since I named him first, we will start off with Rick.

## STATEMENT OF RICHARD F. SCHULTZ, ASSOCIATE NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. SCHULTZ. Thank you, Mr. Chairman.

On behalf of the more than 1.1 million members of the DAV I wish to thank you for the opportunity to express our views before the subcommittee here today. Today's hearing represents the second such hearing by the subcommittee in the 100th Congress, and this is clearly an indication of the subcommittee's commitment to assuring that our nation's disabled veterans and their families receive their legally-entitled benefits.

Mr. Chairman, in order to assure that our nation's veterans and their families receive benefits to which they may be entitled, the DAV employs some 260 national service officers throughout the country. We also employ a national appeals office here in Washington, D.C., staffed by nine highly-skilled national appeals officers.

In regard to the issue of timeliness, Mr. Chairman, as you know, the caseload of the Board of Veterans Appeals has continued to in-

crease over the years. In an effort to alleviate the increasing number of backlogs, Congress took action which resulted in the passage of Public Law 98-223 which increased the board membership from 50 to 65, representing a 30-percent increase.

The majority of the delays in processing of appeals, however, does not rest at the Board of Veterans Appeals, but rather at the regional office level.

Of the 412 days on average which it takes a case to process on appeal, 133 of these days are at BVA, and 279 are at the regional offices. It is interesting to note here that while the Board of Veterans Appeals staff was increased, the regional office staff has decreased over the years, and the problem with timeliness has increased.

In regard to the remands, we believe the steady increase of the number of remands in recent years results from a number of factors. First and foremost is the inadequate staffing at regional offices. Another factor that has influenced the increased number of remands is the aggressive representation of the service organizations.

I believe it is also important to note that during the first three quarters of fiscal year 1988 more than 21 percent of all cases remanded by BVA to regional offices were subsequently allowed by those offices. This unquestionably has benefitted these claimants.

In regard to the cash bonuses, the DAV believes that cash bonuses paid to the board members for achieving established production goals does create the perception that quantity rather than quality of decisions is more important. While we firmly believe this is not the case—and, in fact, BVA diligently strives for quality decisions—nonetheless, we believe the bonus system was unwise. In that regard we do applaud the chairman's decision to discontinue paying bonuses.

In reference to the signature list or third party signatures, we are aware that that has been cancelled. But, quite frankly, we do not believe that the purpose of the chairman's list was to extend preferential treatment to any Member of Congress, nor influence the decision of the board in the veterans appeals.

The practice known as "courtesy signatures" does occur, and specifically in one area which we are concerned with is when acting physicians who, due to statutory restrictions contained in title 38, are unable to sign their cases as they have worked more than the 270 days allowed. We believe that a change in title 38 would go a long way to help alleviate this situation as far as the practice of courtesy signatures.

I believe it is important to note, also, that when actions are perceived to be improper, the Chairman of the Board of Veterans Appeals has taken action to alleviate some of these situations. And while we are on the topic of perceptions, I would like to briefly comment on recent legislation introduced by Senator Murkowski, supported by the DAV, which would make the BVA truly an independent agency. We believe that is a good piece of legislation, and we feel that this committee might also want to look at separating the Board of Veterans Appeals from the Veterans' Administration and from the General Counsel decisions.

In conclusion I can say that we believe the Board of Veterans Appeals renders fair and equitable decisions, and we feel that in order to address the issue of backlogs, we need more staffing at regional offices. We feel that staffing is a major concern as far as the backlog the VA has now.

I would be happy to answer any questions you may have. Thank you.

[The prepared statement of Mr. Schultz appears on p. 61.]

Mr. APPLEGATE. Thank you very much, Rick.

Phil?

**STATEMENT OF PHILIP R. WILKERSON, ASSISTANT DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION; ACCOMPANIED BY SAMUEL J. WALSH, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE COMMISSION**

Mr. WILKERSON. Thank you very much, Mr. Chairman.

The American Legion appreciates this opportunity to comment on certain aspects of the operations of the Board of Veterans Appeals. However, before proceeding with our comments, we have been informed that the full committee will be holding a hearing on September 8 on the subject of judicial review. As a result of our organization's re-examination of our position on this subject, the National Executive Committee of the American Legion approved resolution number 34 on May 5, 1988, setting forth a series of proposals that would, among other things, expand and better define the procedural rights of benefit claimants before the Board of Veterans Appeals.

Subsequently, on July 13, H.R. 5039, the Veterans' Reassurance Act of 1988, was introduced by Chairman Montgomery and Representative Solomon. This legislation will have profound implications on the status and determinations by the board. It will affect certain improvements in basic claims and due process procedures, make the Board of Veterans Appeals completely independent of the VA, enact various reforms in the board's procedures, and expand its jurisdiction to provide limited judicial review of VA regulations and other constitutional issues.

This legislation, we believe, will address in a very direct manner a number of operational problems at the board relating to the quality of the board's decisions and claimants rights to due process which are the focus of today's oversight hearing.

We will, therefore, limit our comments today to issues relating to the current rate of remand and medical expertise in certain board sections, particularly on PTSD cases.

With respect to the remand rate, as has been noted, the remand rate has been increasing and currently stands at more than 20 percent. In the preceding years, however, this had been declining, and in the view of the American Legion this change from one of gradual decline to one of sustained increase to the point of being more than one in five has been due to the erosion of the quality of decisions rendered by the VA's regional offices.

One of the primary factors contributing to this decline in quality has been the persistent and consistent personnel cuts among field stations.

The Department of Veterans' Benefits has, likewise, been constrained in their training of the remaining and replacement personnel by a lack of funds for training and related travel.

In discussing the problem of development of appeals at the regional office with our service officers, they have expressed a recurrent complaint of rating boards or adjudicators denying complex cases rather than undertaking additional development, which is considered essential to a full and fair consideration of the claim. The reason most often given by VA personnel is that they—meaning the regional office—could not do it, but the Board of Veterans Appeals could.

There was an apparent fear of criticism by VA's Central Office if such cases were allowed. This rationale is unacceptable to the American Legion, and claimants should not be forced into a lengthy appeals process for such reasons.

Another situation which we feel often times creates unnecessary appeals is where the claimant or the accredited representative has formally raised an issue or question as to the interpretation of regulations or manual provisions, or where there is a highly-complex medical question.

Many times there is an extreme reluctance on the part of the regional office to accede to a request for an advisory opinion, either through the Veterans' Administration or from outside sources.

Again, we strongly feel that the claimant should not be forced into an appeal which may be unnecessary since such expert technical and medical opinions cannot be obtained from a claimant from sources outside the agency.

The American Legion's position is that the regional office must shoulder its full responsibility to the claimant in resolving such issues.

With regard to the specialties of medical members of the Board of Veterans Appeals with regards to PTSD cases, according to available information, the medical specialties and physicians on those sections assigned to this issue include neurology, internal medicine, OB/GYN, and family practice.

The situation, for example, raises the possibility—or at least the perception—rightly or wrongly, that decisions denying service connection for PTSD have been made by physicians with negligible training, clinical expertise, or expertise in the field of psychiatry, in particular. The question of qualification becomes a critical issue in the reconciliation of diagnoses contained in the record. The board member may well be less qualified medically than psychiatrists or psychologists who have actually examined, diagnosed, or treated the veteran.

It appears that there is only one psychiatrist on the entire board, and under such circumstances we question how the board can assure veterans—at least on this issue—that their claims have received a full and fair consideration.

Mr. Chairman, that concludes our statement. We certainly would be glad to respond to any questions you might have.

[The prepared statement of the American Legion appears on p. 66.]

Mr. APPLEGATE. Thank you very much Phil.

Before we continue on, if you, Rick and Paul, can get through in about two or three minutes we will go ahead and listen. Otherwise, we will just adjourn right now and go over and vote and come right back. Would that be best?

Mr. EGAN. We'll give it a shot.

Mr. APPLEGATE. You want to give it a shot now?

Mr. EGAN. Sure.

Mr. APPLEGATE. All right. Go ahead. And, incidentally, we will be printing, of course, the text of your 33-page statement. Your other attachment will be made a part of the subcommittee record, so it will be on file. It is rather voluminous, and to print it would be very expensive, but we will keep it on file for our records.

**STATEMENT OF RICHARD E. O'DELL, VICE PRESIDENT AND CHAIRMAN OF VIETNAM VETERANS OF AMERICA'S COMMITTEE ON ADVOCACY; ACCOMPANIED BY PAUL E. EGAN, LEGISLATIVE DIRECTOR, VIETNAM VETERANS OF AMERICA**

Mr. EGAN. First of all, Mr. Chairman, there are a couple of things that were stated this morning in the presentation by the Veterans' Administration.

First of all, I think there was somewhat of an effort by the Chairman of the Board of Veterans Appeals to discredit the affidavit of Daniel Bierman, who filed a sworn statement in district court last week, by tracing the historical, statistical history of his production rates and his allowance rates, showing apparently—and I don't know if the statistics are true—that reduced production somehow means fewer allowances. I can't believe that the committee would take that kind of anecdotal evidence seriously.

In any event, any case that has been given a more thorough review than would normally be given, whether or not it receives an allowance or a denial, is a better decision either way.

Secondly, he indicated that the bonuses—and he was rather emphatic about this—did not in any way affect board member independence. Well, if that's true why were the bonuses suspended? And, more importantly, why were they suspended so soon after the filing of our lawsuit?

If, indeed, bonuses were not affecting board member independence, then why is it that the VA decided that they wouldn't allow that particular part of our complaint to withstand the test of a court contest. This is something I can't understand.

Finally, the BVA chairman indicated, with reference to Mr. Evans' question about the memo from Phil Wright, asking about the permissibility of courtesy signatures that it was to be left up to the discretion of the individual section. I think it is important to remember that either after or at the time that Mr. Wright sent that memo to the chairman his section was producing in excess of 100 cases a week. That is over double the quota that has been set by the chairman.

Someone in that circumstance, I'm sure, would have an interest in knowing whether the practices in his own section were permissi-

ble. And, if after the receipt of the memo from Mr. Eaton, he determined that it was permissable, that would explain an increase in production at the time bonuses were available.

After having said that, I would just like to say one thing to reassure Mr. McEwen, and that is that our organization spends a great deal of time devoting attention to every member of this committee. And if we had a list—which we don't—you would certainly be on it.

After having said that, I will let Rick O'Dell finish.

Mr. O'DELL. Mr. Chairman, I have some prepared remarks, but I'm going to defer those because I think our statement adequately speaks to the issue before the committee.

However, I must say that I am somewhat shocked and dismayed by the rather transparent attack upon this organization earlier in this hearing by the VFW.

I find it somewhat outrageous that another organization would infer that my organization—the Vietnam Veterans of America—is run by a group of frustrated lawyers.

I would like to assure Mr. Thorson and the VFW that, unlike a lot of other organizations, the Vietnam Veterans of America is, in fact, run by its elected leadership. Of its four officers, there is not a single one of us who is an attorney.

Personally, for the past five years I have chaired VVA's advocacy committee which controls our litigation program. The lawsuit against the Board of Veterans Appeals, the subject before this hearing today, was initiated over my approval and with that committee.

I also find it kind of incredulous that the charge would be made that we engage in filing frivolous lawsuits, and that their organization is tired of hearing about them.

I would point out to the VFW that my experience in veterans' affairs includes five years as one of their service officers, and that much of what I know about the practice of veterans' law was learned as I served with that organization.

For them to characterize litigation as frivolous is the height of ignorance; the articulation of ignorance by an organization that does not, in fact, practice veterans' law.

You know, one thing that we learned in Vietnam is that body counts and raw numbers are not a good measure of success. And I would submit to this committee that raw numbers about the production of claims adjudicated is not a measure of quality.

Thank you very much.

[The prepared statement of Vietnam Veterans of America appears on p. 70.]

Mr. APPLEGATE. Thank you very much, Rick. That is a strong statement.

I thank you all very much for coming before the committee, and we probably will have some questions that we may submit to you, and, if you would, please answer them.

With that I will adjourn the committee.

[Whereupon, at 10:34 the subcommittee was adjourned, to reconvene at the call of the Chair.]

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# APPENDIX

## Opening Statement of
## Honorable Douglas Applegate, Chairman

Good morning ladies and gentlemen. We are meeting this morning to review the operation and performance of the Board of Veterans Appeals. Our last oversight hearing on this subject was conducted on October 6, 1987.

As always, we will hear testimony from the Chairman of the Board as well as representatives from several service organizations.

We will address issues concerning the timeliness and quality of the appeals process at both the field level and Board level. We will hear a report from the Chairman in response to concerns raised last year on the issue of remands. And, finally we will hear comments on issues of alleged improprieties at the Board and how they are being addressed by the Chairman.

I continue to consider these oversight hearings to be of great value to us in pinpointing areas where corrective action or other improvements might be warranted. We will certainly be interested to hear what the service organizations have to say in this regard.

Let me say that, for the most part, the organizations have given the Board a pretty good report. I continue to notice that a very large part of any problem that anyone raised with regard to the overall processs, which starts at the field level, is the lack of proper staffing at the regional office level. I can assure you that we will again make every effort we can to assure that no further cuts in staffing are allowed.

STATEMENT OF HON. BOB MCEWEN

BOARD OF VETERANS APPEALS HEARING

THANK YOU, MR. CHAIRMAN. I COMMEND YOU FOR HOLDING THIS OVERSIGHT HEARING ON THE OPERATIONS OF THE BOARD OF VETERANS APPEALS.

IN MY VIEW, IT IS IMPORTANT THAT OUR COMMITTEE BE DILIGENT IN OUR EFFORTS TO ENSURE THAT THIS BOARD FUNCTIONS PROPERLY, FAIRLY, EFFECTIVELY, AND IN A TIMELY MANNER.

MR. CHAIRMAN, OUR WITNESSES TODAY WILL PROVIDE OUR SUBCOMMITTEE WITH THEIR VIEWS CONCERNING THE BOARD. THEIR OPINIONS IN THIS REGARD ARE AN ESSENTIAL INGREDIENT TO OUR OVERSIGHT PROCESS.

IF WE ARE TO EFFECTIVELY AND PROPERLY CARE FOR AMERICA'S VETERANS, OUR COMMITTEE MUST HAVE THE BENEFIT OF THEIR OPINIONS. CONSTRUCTIVE CRITICISM IS HEALTHY -- IT ENABLES ALL OF US TO TAKE STOCK OF WHERE WE ARE AND WHAT WE

MR. CHAIRMAN, WE HAVE SEEN THE RESULTS OF THESE OVERSIGHT EFFORTS. AS THE MEMBERS OF THIS SUBCOMMITTEE WILL RECALL, WE INCREASED THE NUMBER OF BOARD MEMBERS FROM 50 TO 65 DURING THE 98TH CONGRESS TO HELP ALLEVIATE THE BACKLOG OF CASES AT THE BOARD OF VETERANS APPEALS.

MR. CHAIRMAN, THERE IS STILL MUCH WORK TO DO TO REDUCE THE NUMBER OF DAYS TO PROCESS THESE APPEALS. HOWEVER, IT IS IMPORTANT THAT AMERICA'S VETERANS KNOW THAT WE SHARE THEIR CONCERN IN THIS REGARD, AND THAT WE SHARE THEIR DESIRE THAT EACH CLAIM RECEIVES FAIR AND PROPER CONSIDERATION BY THE VA.

I LOOK FORWARD TO HEARING THE TESTIMONY OF THE WITNESSES THIS MORNING, AND I WANT TO JOIN WITH YOU IN WELCOMING THEM HERE TODAY.

VETERANS ADMINISTRATION
Statement of Kenneth E. Eaton
Chairman, Board of Veterans Appeals
To the Subcommittee on Compensation,
Pension and Insurance
House Committee on Veterans' Affairs

August 11, 1988

Mr. Chairman, I appreciate this opportunity to meet with your Subcommittee to discuss the operations and performance of the Board of Veterans Appeals. At my last appearance before this Subcommittee in October of 1987, I reported to you on several aspects of the BVA's operations. I will be giving you an update of that information today.

As I reviewed the information which went into the preparation of this statement, I stepped back from it all and thought about what was the most important goal of the BVA. It is not production, timeliness or the quality review of the decision per se. Without question it is the correctness of the disposition of the appeal. If you consider the background and experience of the Board Members you will be struck by their knowledge and the number of years they have devoted to veterans affairs. From my own standpoint, I can assure you that they are an extremely professional and hard working group of attorneys and doctors. They are very conscientious and can be relied upon to take the necessary amount of time to review a case. They, individually, must be personally convinced that the disposition they agree to is the correct result and they have clearly demonstrated this ability to me over and over again. I personally feel confident that BVA allowances and denials are sound and that when there is a close case the Board Members decide all relevant issues in favor of the appellant. In other words, the appellate process ensures that claimants are receiving the benefits they deserve. That is the bottom line.

First I would like to emphasize that while many of our most familiar management tools and indicators focus on production, timeliness and cost matters, we never lose sight of our responsibility with respect to maintaining the integrity of the appellate process. In previous appearances before this Subcommittee, I have described our quality review system and our efforts to enlarge our attention to quality related issues. We continue to focus a great deal of management efforts on our review process, and I believe that the overall quality of our BVA decisions reflect these efforts.

I would like to take a moment to attempt to define the concept of quality controls at the BVA. First of all, what quality control is not is the substitution of a Deputy Vice Chairman's judgment for that of Board Members. The allowance/denial rate is not affected by this review because of the need to maintain independence in the appellate process. Because of the large number of appeals there is always the chance that there are errors in any decision despite the numerous reviews it has undergone in the Board Section. The primary purpose of the quality review is to check that all the elements of the decision are present and that all of the issues have been handled. The decisions are then reviewed to eliminate any typographical and grammatical errors. A selection of decisions containing significant issues or involving certain legal procedures is also made for the Deputy Vice Chairmen to review. This permits them to be kept informed as to how the Board Sections handle cases involving reconsiderations, administrative allowance recommendations, dissents, loan guaranty, AIDS, radiation, etc. While I believe that the quality of BVA decisions is very high, I am always interested in finding ways to improve them.

Not only is the quality of the Board's operations such as to ensure fairness to appellants, but the operations themselves effectively and efficiently handle the huge volume of appeals generated in the administration of the various veterans' benefits programs. The Board produced a total of 41,296 appellate decisions during Fiscal Year 1987. As of the end of FY 1987 our average BVA response time on appeals was 128 days. We have produced a total of 31,146 decisions during the first three quarters of FY 1988, and our

cumulative BVA response time on appeals was 136 days as of June 30, 1988. I have included a table (Table 1) with this prepared statement summarizing some of our most relevant production-related statistics over the past several years to provide you with an overview of our productive endeavors.

You indicated in your letter of July 12, 1988 that you intend to consider, among other subjects, timeliness in the VA appeals process. From our interactions with various Congressional Members and staff over the past year, we have found that some of the concepts and indicators used by the BVA to measure timeliness are not thoroughly understood. Therefore, I would like to supplement my remarks on the current status of timeliness in the appeals process with some background on how we measure timeliness.

Timely action on appeals has always been a matter of concern to those in oversight capacities relative to the BVA and is a major objective of the BVA itself. To measure how well the timeliness objective is being met, the Board employs two separate and distinct indicators. The first of these two indicators is elapsed processing time. Elapsed processing time is a simple measure of all time that transpires between when an appellant first files a notice of disagreement and when a BVA decision is entered. Included in this time period are the various appeals processing stages accomplished at the field station level as well as those procedural steps that are the responsibility of the individual appellant. As a timeliness indicator, elapsed processing time is strictly a historical measure that shows the average length of time that was required to process a given group of appeals from their inception to their completion during some specifically defined preceding time period. Elapsed processing time is the format that we traditionally use to recap the overall VA appellate system processing time, including processing steps that occur in the field. All times shown in Table 1 are presented in an elapsed processing time format.

The second of these two indicators is BVA response time on appeals. BVA response time on appeals is a future-oriented timeliness indicator that is limited in scope to the appeals processing steps that are the responsibility of the BVA. This timeliness indicator is familiar to most organizations that follow BVA activities. However, not everyone understands exactly what BVA response time on appeals represents or how this indicator is used within the BVA. The primary use of BVA response time on appeals is to predict the average time that will be required to render decisions on the currently pending volume of appeals that have completed the field processing stages and are awaiting BVA action. By taking into account the Board's most recent appeals processing rate and the currently pending volume of appeals that have completed the field processing stages and are awaiting BVA action (i.e., both at the BVA and in field stations), BVA response time projects the average time that will be required to render decisions on that same group of pending appeals.

BVA response time is computed by first determining the BVA's average daily appeals processing rate for a recent given time period. This can be simply determined by dividing the number of appeals decided by the calendar day time period over which those appeals were dispatched. For example, the BVA's average daily appeals processing rate for FY 1987 is determined as follows: 41,296 Appeals Decided / 365 Days = 113 Appeals per Day. The second step in the computation of BVA response time is to determine the total volume of appeals that are currently pending and chargeable to the BVA. This volume consists of all appeals that are actually in process at the Board and those appeals in the field that have completed field processing steps and are pending transfer to the Board. At the end of FY 1987, a total of 14,457 appeals were chargeable to the BVA. The total volume of appeals thus computed is then divided by the average daily processing rate to provide the BVA response time. As a formula, BVA response time can be represented in the following manner:

$$\text{BVA Response Time on Appeals} = \frac{\text{Total Appeals Chargeable to BVA}}{\text{Avg. Daily BVA Processing Rate}}$$

BVA Response time for FY 1987 was computed as follows:

$$\frac{41,296 \text{ Decisions}}{365 \text{ days}} = 113 \text{ Decisions per Day}$$

$$\frac{14,457 \text{ Appeals Chargeable to BVA}}{113 \text{ Decisions per Day Processing Rate}} = 128 \text{ Day Response Time on Appeals}$$

This concept of BVA response time on appeals evolved in the early 1980's when the BVA was facing a backlog of appeals that was growing faster than our ability to process them on a timely basis. Appeals were being forwarded to the BVA in a volume that substantially exceeded the Board's decision output capabilities, and, as a result, the number of appeals that were physically on hand at the BVA became overwhelming. To address this problem,the BVA and the Department of Veterans Benefits instituted a callup procedure that was applied to appeals that had completed all of the field appellate processing steps and were certified for BVA action. This callup procedure allowed these files to physically remain in the local regional office until the BVA was ready to call them up for decision action. BVA response time on appeals was developed as a concept to account for this period of time that appeals were awaiting BVA callup. While BVA elapsed processing time would not include this time interval, the responsibility for this time clearly was on the shoulders of the BVA rather than DVB. Furthermore, because this backlog growth was a dynamic as opposed to a static situation, we were interested in developing a timeliness indicator that could meaningfully project the expected BVA time requirements for pending appeals. BVA response time consequently evolved as the indicator to satisfy this objective.

Although there is currently no backlog of certified appeals in the field awaiting BVA callup, we continue to view BVA response time on appeals as an extremely useful timeliness indicator to supplement our elapsed processing time information. BVA response time does predict, with a fair measure of success, the time interval between the certification of the appeal to the BVA and the decision dispatch date. Our BVA response time as of the end of FY 1986, for example, was computed to be 130 days, and our actual response time for FY 1987 was 134 days. BVA response time also serves as one of the single most meaningful indicators of BVA productivity as well as timeliness, and we believe that this concept serves to complement our elapsed processing time information.

In addition to timeliness and productivity indicators, we periodically examine other factors that we find useful in developing a broad picture of BVA activities. Among these factors is a simple financial analysis we perform to compute the average cost per BVA appeal decided. We believe this type of analysis is helpful in two ways: (1) it helps promote economical management by displaying our spending trends over time; and (2) it helps put the total annual volume of BVA decision production into perspective. The following data summarize BVA costs per case over the past five years:

| | FY 84 | FY 85 | FY 86 | FY 87 | FY 88 (est) |
|---|---|---|---|---|---|
| FTEE (average) | 410.9 | 437.1 | 416.9 | 417.7 | 423.5 |
| Overtime | 5.1 | 5.8 | 0.7 | 3.0 | 1.0 |
| FTEE with Overtime | 416.0 | 442.9 | 417.6 | 420.7 | 424.5 |
| Decisions | 44,064 | 45,273 | 42,003 | 41,296 | 42,000 |
| Output/FTEE (with OT) | 105.9 | 102.2 | 100.6 | 98.2 | 98.9 |
| Total Payroll ($K) | $13,803.1 | $15,407.3 | $15,365.3 | $16,305.3 | $17,310.0 |
| Total Obligations ($K) | $14,597.3 | $16,771.8 | $16,359.3 | $17,441.8 | $18,550.0 |
| Total Costs/Case | $331.28 | $370.46 | $389.48 | $422.36 | $441.67 |

FTEE = Full Time Employee Equivalents
OT = Overtime

We believe that, when examined through this type of analysis, the average costs of the appellate operations of the Board of Veterans Appeals are indeed quite reasonable. We do not want to suggest that managing the Board's activities is analagous to a manufacturing operation where our primary objectives are cost controls and the bottom line. However, effective management must include the efficient management of resources, and we believe that our costs per case demonstrate that the VA appellate process is a cost-effective operation. The gradual upward trend in the average case cost beginning in FY 1985 reflects three changes: (1) we upgraded the journeyman level BVA staff attorney position from GS-13 to GS-14 to help us recruit and retain a high caliber attorney staff; (2) we began an office automation initiative in FY 1985 that entails some significant capital investment; and (3) we have devoted and will continue to devote a significantly higher degree of attention and resources to controlling the quality of BVA decisions and the BVA decision process.

Another issue raised at my last appearance before this Subcommittee was the increase that had recently occurred in the rate at which the BVA was remanding appeals back to the field. While we could speculate at that time as to the reasons underlying this increase in the remand rate, we were not able to conclusively point to the cause of this change. At the conclusion of the October 6, 1987 hearing, I had agreed to work with the Chief Benefits Director to pinpoint reasons why the remand rate was rising and to determine what, if anything, should be done to reverse this trend.

After some discussions between the Department of Veterans Benefits (DVB) and the BVA on this issue, it was decided that DVB would conduct a examination into this matter. The BVA provided DVB a listing identifying all remands issued during FY 1987, and DVB selected a random 5% sample of these cases for a review that was performed by a group of DVB field station personnel. These individuals reviewed the claims folders pertaining to the cases selected in the 5% sample to determine whether, in their judgment, a remand was the appropriate disposition in each of these cases. A draft report summarizing the findings of the DVB task force was provided to the BVA for comments on March 25, 1988. We reviewed the draft report and provided our comments to the Chief Benefits Director on April 18, 1988. It is our understanding that the Chief Benefits Director has approved the final report and that a copy of the report has been provided to the House Veterans' Affairs Committee.

We believe that this study was a useful endeavor and that it will serve as an effective reminder to both DVB and BVA staff of the importance of adhering to established appellate practices. Many of the conclusions and recommendations of the study appeared to be oriented towards an underlying goal of reducing the rate at which appeals are remanded by the BVA to the field. We supported the idea of attempting to identify the causes responsible for the remand rate growth, but we did not categorically accept the premise of reducing the remand rate as a goal in and of itself. Nothing was presented in the study that would suggest that a reduction in the BVA remand rate would be in the best interest of veterans. The study's findings actually show the converse to be true; of the sampled cases on which final decisions had been made, 33% were allowed in the field and 17% were allowed by the BVA upon recertification of the cases back to the Board. The BVA ultimately supported the field station denials on only 48% of this group of appeals. Our feeling is that this remand issue is not necessarily a problem in want of a solution. The study's findings point to areas in both the BVA and DVB where attention may be warranted. However, we do not feel that any of these findings indicate a need to develop a set of rigid standards that we would expect Board Members to apply as conditions for remands. Furthermore, the establishment of standards would be undesirable in that they would compromise Board Member independence.

Many, if not most, of the highlighted points outlined in the report represent what often amounts to a difference in judgment between different reviewers. In our opinion, this may not be an undesirable situation. The VA's adjudication processes can benefit from a degree of internal contention at the appellate level. In fact the findings of the study demonstrate that the presence of appellate review is having the expected result. In contrast to some of the criticisms of the VA system offered by many proponents of judicial review, this demonstrates that our system is healthy and vital.

From a strictly managerial viewpoint, we do not feel that it would be advisable to create what would amount to central DVB/BVA guidelines on such issues as when special examinations are necessary. If DVB field stations would attempt to anticipate each instance where a special examination may be requested by the BVA, we would expect to see a vast growth of special examinations conducted in the earlier adjudication phases. This would entail considerable additional costs to the VA and would, in our opinion, result in a far greater number of unnecessary special examinations. The implied counterpart of this proposal to develop guidelines for requesting special examinations is that BVA Board Members would be constrained from remanding for this purpose when the guideline conditions were not met in an individual appeal. This would suggest a limitation to the decision making independence of Board Members that we could not support.

We have provided copies of this study report to all BVA Board Sections for their information. We believe that the sharing of this information with them will complement DVB's plans for additional field station adjudication personnel training. As we noted earlier, we still do not feel that reducing the remand rate is an appropriate goal in and of itself for the Board of Veterans Appeals. Aside from a pure efficiency standpoint, there is no indication that this goal would contribute to the overall mission of the VA. However, we have speculated before that some reduction in the remand rate will occur as a result of the effort put forth in this study and the subsequent sharing of its result within DVB and BVA. Our remand rate for the first three quarters of FY 1988 has come down to 19.1% from the all-time high FY 1987 level of 20.7%. Consequently, it would appear that this study has served its purpose.

You also indicated that you intend to consider the allegations of impropriety in the decision making process and issues surrounding pending litigation, e.g., Vietnam Veterans of America et al., v. Turnage et al. As it is neither my own nor the VA's policy to move matters currently before the courts into the public opinion arena, my comments on this litigation must of necessity be limited.

The major issues raised in this litigation are the use of the Chairman's personal signature list, the effect of the weekly goal of 40 cases, the propriety of cash bonuses for Board Members and the extent of third Board Member reviews in appellate decisions.

The Chairmen of the BVA have always maintained a personal signature list. This list contained the names of members of both the House and Senate Veterans' Affairs Committees as well as a few other members of Congress who have expressed an interest in veterans matters. At the time that a decision is dispatched from the BVA, a transmittal letter accompanies the decision. This letter contains a printed signature of the Chairman of the Board. It is not uncommon for appellants to write to Members of Congress and request that they contact the BVA on their behalf. The Board will then receive a letter from a Congressman or Senator in reference to the pending appeal of their constituent. When the decision is dispatched a copy of the decision along with a transmittal letter will be sent to the particular Congressional office. In those appeals in which an individual on the list has expressed such an interest and requested that a copy be sent to the Washington office, I personally signed the letter of transmittal. In the course of signing, I always checked the decision contents for any errors. Because of some criticism that this practice constituted preferential treatment on behalf of those appellants who contacted particular Members of Congress, I discontinued this practice in June 1988. I might add that although I have reviewed decisions in which I personally signed the letter of transmittal, the disposition had already been made. This review was not intended to alter the outcome of a decision or influence Board Member judgment. I signed these letters not only as a courtesy to those individuals who have an expressed major concern in veterans' issues, but also to keep myself informed as to what those concerns might be. In my opinion, this did not result in any preferential treatment.

There has been some criticism of the 40 decisions a week Section goal. I have found that this goal is important to ensure that the processing time for appeals is kept within reasonable limits. In arriving at a goal, many

factors were considered. We had to project anticipated receipts and calculate the number of decisions which had to be dispatched to remain current. This, in turn, had to be divided by the number of Sections available to do the work and resulted in a 40 decisions per week goal. Many years of experience in handling appeals has led us to believe that this is a practical and reasonably attainable goal. The mix of decisions which a Board Section reviews each week varies a great deal. Some of the appeals require several hours of review time while others can be disposed of quite briefly. I do not attempt to limit the amount of time that a Board Member may spend on a case, but experience at the BVA has shown that 40 decisions a week is a reasonable goal in which the Board Members can choose the amount of time needed to review a particular appeal in order to reach a fair decision. My essential role of manager of the BVA is to view the organization in broad perspective and to strike an appropriate balance between productivity and timeliness imperatives and research, review and deliberation demands of both attorneys and Board Members.

Another longstanding practice at the BVA was to authorize cash bonuses or "within-grades" to Board Members who realized or exceeded their Section goal. These bonuses usually ranged from 1% to 5% of the annual salary of the Board Member. This along with the Section goal greatly encouraged the maintenance of reasonable processing times at the BVA. It has become necessary to discontinue this policy. Regulations issued by the Office of Personnel Management (OPM) generally establish that an award for performance must be based on a rating of record under a performance appraisal system. Since Board Members have been exempted from performance appraisal requirements, they are now deemed ineligible for performance-based awards. Nevertheless BVA Board Members, as a group, are hard-working, dedicated individuals who will continue to be motivated by their personal pride and sense of professionalism. However, the potential for cash awards is a tangible motivational factor that can serve as a positive incentive for any professional to "go the extra mile" and produce at a level over and above normal expectations.

With respect to third reviews, I have always expected that each participating Board Member would devote whatever review time he or she thought was necessary in order to reach a fair decision. I rely on the professional judgment of the individual Board Member to determine how thorough such review must be. Because there have been allegations that Board Members sign decisions without reviewing them, I issued a numbered memorandum in May 1988 which reminds them that they must take the necessary and appropriate time to review each decision. At many of my weekly Chief Member meetings I have commented on the importance of an adequate review. To further ensure every opportunity for a thorough review, I am making arrangements to hire additional physicians and have expanded the number of attorneys on the Acting Board Member list.

Any further comments on the subject matter of the pending litigation would be inappropriate. However, we feel confident that the Board is doing everything possible to ensure fair and equal treatment for all appellants.

Mr. Chairman, this completes my prepared statement. I will be happy to answer any questions that you may have.

TABLE 1 APPEALS STATISTICAL DATA - BOARD OF VETERANS APPEALS

| | FY 1983 | FY 1984 | FY 1985 | FY 1986 | FY 1987 | 3 Qtrs FY 1988 |
|---|---|---|---|---|---|---|
| FIELD WORKLOAD DATA* | | | | | | |
| Appeals Filed (NODs) | 69,391 | 61,328 | 63,045 | 63,850 | 63,570 | 48,239 |
| Dispositions | 64,919 | 64,261 | 67,534 | 60,677 | 62,487 | 46,106 |
| % Allowed | 13.5% | 12.7% | 12.4% | 12.5% | 12.5% | ** |
| % Closed | 20.3% | 21.7% | 26.4% | 22.0% | 22.0% | ** |
| % Withdrawn (and Other) | 10.7% | 10.2% | 10.4% | 10.5% | 10.5% | ** |
| % Certified to BVA | 55.5% | 55.4% | 50.8% | 55.0% | 55.0% | ** |
| Pending - End of Period | 49,498 | 46,818 | 44,145 | 45,737 | 46,625 | 47,658 |
| BVA WORKLOAD DATA | | | | | | |
| Receipts | 41,226 | 43,811 | 43,457 | 43,584 | 41,491 | 32,246 |
| Dispositions | 38,591 | 44,064 | 45,273 | 42,003 | 41,296 | 31,146 |
| % Allowed | 13.7% | 13.8% | 13.3% | 12.8% | 12.8% | 13.3% |
| % Remanded | 15.5% | 14.9% | 16.3% | 18.8% | 20.7% | 19.1% |
| % Withdrawn (and Other) | 1.0% | 0.9% | 1.1% | 1.3% | 1.4% | 1.1% |
| % Denied | 69.9% | 70.3% | 69.3% | 67.2% | 65.1% | 66.6% |
| Pending - End of Period | 14,750 | 14,497 | 12,681 | 14,262 | 14,457 | 15,557 |
| Benefits Granted by AOJ | 1,311 | 1,376 | 1,779 | 1,730 | 1,781 | 1261 |
| Benefits as a % of Remands | 22.0% | 20.9% | 24.1% | 21.9% | 20.8% | 21.2% |
| Formal VACO Hearings | 1101 | 1191 | 1231 | 1139 | 1192 | 979 |
| Travel Board Hearings | 587 | 708 | 645 | 645 | 665 | 542 |
| Offices Visited | 48 | 50 | 48 | 48 | 51 | 49 |
| Categories of Appeals | | | | | | |
| Disability Compensation | 76.6% | 76.3% | 75.7% | 75.2% | 75.7% | 77.0% |
| Disability Pension | 6.4% | 7.1% | 6.9% | 6.5% | 6.1% | 5.7% |
| Medical | 1.3% | 1.6% | 1.7% | 1.6% | 1.3% | 1.4% |
| Insurance | 0.4% | 0.3% | 0.3% | 0.3% | 0.2% | 0.2% |
| Death | 5.7% | 6.0% | 6.1% | 6.1% | 6.1% | 5.7% |
| Training | 2.3% | 2.2% | 1.8% | 1.8% | 1.4% | 1.3% |
| Waiver | 5.3% | 4.5% | 5.3% | 5.4% | 5.2% | 4.7% |
| Loan Guaranty | 0.6% | 0.7% | 0.9% | 1.7% | 2.3% | 2.4% |
| Reconsiderations | 0.5% | 0.6% | 0.7% | 0.7% | 0.7% | 0.7% |
| Character of Discharge | 0.2% | 0.2% | 0.2% | 0.2% | 0.2% | 0.2% |
| Elapsed Processing Time - Days | 499 | 445 | 414 | 398 | 413 | 412 |
| NOD to SOC | 53 | 50 | 51 | 54 | 54 | 56 |
| SOC to SA | 55 | 53 | 54 | 55 | 57 | 59 |
| SA to Certification | 90 | 210 | 180 | 183 | 172 | 164 |
| Certification to Callup | 190 | 15 | 15 | 0 | 0 | 0 |
| Callup to BVA Decision | 111 | 117 | 114 | 106 | 130 | 133 |
| Pending - End of Period | 64,248 | 61,315 | 56,826 | 59,999 | 61,082 | 63,215 |
| Field: NODs | 21,609 | 22,236 | 20,707 | 25,448 | 25,949 | 26,250 |
| Subs. Appeals | 27,889 | 24,582 | 23,438 | 20,289 | 20,676 | 21,408 |
| BVA: Subs. Appeals | 14,750 | 14,497 | 12,681 | 14,262 | 14,457 | 15,557 |

* Field workload data estimated for FY 1986, 1987 and 1988

** Insufficient information for estimation purposes

NOD = Notice of Disagreement AOJ = Agency of Original Jurisdiction

SA = Substantive Appeal VACO = Veterans Administration Central Office

Board of Veterans Apppeals
Overall Representation
Three Quarters FY 1988

| Representation | Tot. Decisions No. | % | Allowed No. | % | Remanded No. | % | Denied No. | % | Other No | % | Benefits Granted No. | % * | Letter Recons. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| American Legion | 4237 | 13.6% | 509 | 12.0% | 809 | 19.1% | 2860 | 67.5% | 59 | 1.4% | 198 | | 13 |
| AMVETS | 964 | 3.1% | 121 | 12.6% | 185 | 19.2% | 655 | 67.9% | 3 | 0.3% | 39 | | 4 |
| American Red Cross | 353 | 1.1% | 58 | 16.4% | 58 | 16.4% | 234 | 66.3% | 3 | 0.8% | 16 | | 0 |
| Disabled American Veterans | 13904 | 44.6% | 1910 | 13.7% | 2629 | 18.9% | 9228 | 66.4% | 137 | 1.0% | 517 | | 34 |
| Jewish War Veterans | 79 | 0.3% | 15 | 19.0% | 21 | 26.6% | 42 | 53.2% | 1 | 1.3% | 0 | | 0 |
| Military Order of Purple Heart | 402 | 1.3% | 53 | 13.2% | 106 | 26.4% | 240 | 59.7% | 3 | 0.7% | 31 | | 0 |
| Paralyzed Veterans of America | 815 | 2.6% | 151 | 18.5% | 171 | 21.0% | 478 | 58.7% | 15 | 1.8% | 50 | | 1 |
| Veterans of Foreign Wars | 3101 | 10.0% | 386 | 12.4% | 533 | 17.2% | 2142 | 69.1% | 40 | 1.3% | 142 | | 7 |
| State Svc. Org. | 3089 | 9.9% | 397 | 12.9% | 589 | 19.1% | 2081 | 67.4% | 22 | 0.7% | 113 | | 13 |
| Attorneys | 520 | 1.7% | 85 | 16.3% | 122 | 23.5% | 304 | 58.5% | 9 | 1.7% | 17 | | 1 |
| Agents | 27 | 0.1% | 2 | 7.4% | 5 | 18.5% | 20 | 74.1% | 0 | 0.0% | 3 | | 1 |
| Vietnam Veterans of America | 35 | 0.1% | 5 | 14.3% | 10 | 28.6% | 17 | 48.6% | 3 | 8.6% | 1 | | 0 |
| Other Representation | 286 | 0.9% | 49 | 17.1% | 64 | 22.4% | 169 | 59.1% | 4 | 1.4% | 8 | | 0 |
| No Representation | 3334 | 10.7% | 386 | 11.6% | 660 | 19.8% | 2258 | 67.7% | 30 | 0.9% | 126 | | 8 |
| TOTALS | 31146 | 100.0% | 4127 | 13.3% | 5962 | 19.1% | 20728 | 66.6% | 329 | 1.1% | 1261 | 21.2% | 82 |

* Benefits Granted as a percent of remands; i.e., in 1261 cases (21.2% of 5962 remands), AOJ granted benefits.

(REPDISP3: REP)
(8/10/88)

Board of Veterans Appeals Washington D C 20420

Veterans Administration

AUG 2 4 1988

In Reply Refer To (01C)

Honorable Douglas Applegate
Chairman, Subcommittee on Compensation,
Pension and Insurance of the
Committee on Veterans' Affairs
United States House of Representatives
335 Cannon House Office Building
Washington, DC 20515

Dear Mr. Applegate:

During the course of testifying before your Subcommittee on August 11, 1988, I indicated that I would supply certain information for the record. Accordingly, I am enclosing a list of the physicians assigned to Board Sections with jurisdiction over the issue of service connection for post-traumatic stress disorder and a list of these physicians' respective medical specialties. I am also providing a copy of my personal signature list issued in May 1988, along with a copy of my memorandum of June 24, 1988, rescinding this list.

I hope this information is helpful.

Sincerely,

KENNETH E. EATON
Chairman

Encl.

*"America is #1--Thanks to our Veterans"*

Office of the Chairman
Board of Veterans Appeals
Washington, D.C. 20420

May 2, 1988

MEMORANDUM
NO. 01-88- 37

SUBJ: Chairman's Personal Signature List

1. PROCEDURE

When the following persons have expressed an interest in a case, and correspondence is being directed to the Capitol Hill offices, the case, after processing through AIRS and prior to dating and dispatch of correspondence, will be routed through the Chairman's office to the Executive Assistant for review and signature. Where a letter is being sent to the district offices, it should not be sent to the Executive Assistant but rather should be signed by the Chief of the Section preparing the correspondence, e.g., Chief, Special Correspondence and Inquiries Section; Chief, Hearing Section.

2. COMPOSITION

The Chairman's personal signature list will be composed of the following Senators and Congressmen.

| SENATORS | CONGRESSMEN |
|---|---|
| Alan Cranston, Chairman, Senate Veterans' Affairs Committee | G. V. Montgomery, Chairman, House Veterans' Affairs Committee |
| Frank H. Murkowski | Gerald B. H. Solomon |
| Alan K. Simpson | John Paul Hammerschmidt |
| Mark O. Hatfield | Jim Wright, Speaker of the House |
| Thomas A. Daschle | Denny Smith |
| | Douglas Applegate |
| | Don Edwards |

3. RESCISSIONS

a. Chairman's Memorandum No. 01-87-10, dated March 9, 1987, subject: Chairman's Personal Signature List, is hereby rescinded.

b. This memorandum is automatically rescinded December 31, 1988.

KENNETH E. EATON
Chairman

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Chief, Paperwork Management and Regulations Service (731)

Office of the Chairman
Board of Veterans Appeals
Washington, DC 20420

June 24, 1988

MEMORANDUM
NO. 01-88-45

SUBJ: Rescission of Chairman's Numbered Memorandum

1. PURPOSE

The purpose of this memorandum is to rescind the latest version of the Chairman's numbered memorandum concerning the Chairman's Personal Signature List, and a subparagraph in MBVA-1.

2. EFFECTIVE DATE

This memorandum is effective immediately.

3. RESCISSIONS

a. Chairman's Memorandum No. 01-88-37 dated May 2, 1988, subject: Chairman's Personal Signature List, is hereby rescinded in its entirety.

*(NOTE: It is no longer necessary to refer cases involving the Senators and/or Congressmen as listed in the Personal Signature List to the Chairman or the Executive Assistant for review and signature.)*

b. MBVA-1, pt. II, par. 9.58(11), is hereby rescinded.

*(NOTE: These cases will not be referred to the Deputy Vice Chairmen prior to release of the decision.)*

c. This memorandum is automatically rescinded and may be discarded as soon as the above rescissions have been made.

KENNETH E. EATON
Chairman

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Chief, Paperwork Management and Regulations Service (731)

STATEMENT OF

GORDON K. THORSON, SPECIAL ASSISTANT
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FORRIGN WARS OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

THE OPERATION OF THE BOARD OF VETERANS APPEALS

WASHINGTON, D. C. AUGUST 11, 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

The Veterans of Foreign Wars is always ready and willing to appear before this Subcommittee and present the viewpoint of our organization. The 2.2 million members of our proud organization would like to thank the Chairman for scheduling another oversight hearing on the Board of Veterans Appeals (BVA).

The Board of Veterans Appeals was established in 1933 as the final appellate authority over all Veterans Administration (VA) benefits, excluding insurance claims. The structure of the BVA includes a Chairman, Vice Chairman, Deputy Vice Chairman and 21 Board sections. Each Board section is made up of three voting members, typically composed of two attorneys and one physician. Every section is supported by a complement of staff attorneys who review appeals, conduct necessary research, and prepare tentative decisions for final consideration by the Board section. The BVA is often referred to as the "Supreme Court" of veterans' benefit claims as the BVA is the final authority on a veteran's claim against the government.

Before the BVA takes any action on a claim for veterans benefits, certain steps in the process must have already taken place. Veterans who disagree with a VA benefit decision have the right to formally question that decision. When a claimant files a Notice of Disagreement with a VA decision, the VA must then reconsider their decision. If, after reviewing the decision, it is decided the decision should stand, the VA is then required to issue a statement of the case to explain why, how, and what legal bases the decision was made. If, after reviewing the statement of the case, the veteran claimant still disagrees with the VA's decision, he then has the right to appeal that decision to the BVA.

Most veterans who perfect an appeal to the BVA, strongly believe that their case has been wrongly denied. They are convinced that their claim is meritorious and should be allowed. Because of these obvious expectations, the Board must make every effort to give a comprehensive and thorough review of all cases presented for appeal. They (the Board) must strive to provide an accurate interpretation of law and regulation thereby ensuring fair and just treatment under the law.

Once the BVA receives an appeal it is assigned to the section whose specialty coincides with the question at issue for a final decision. The Board section staff conducts a complete review of all evidence of record. When the staff review is completed, a tentative decision is written and presented to the Board for a final review and decision. The Board will then issue a written decision listing all pertinent laws and regulations, all findings of fact, conclusions of law, and stated reasons for their decision. If the Board feels that further case development is necessary to ensure a just decision, the Board can delay making a final decision and return the case (remand) to the originating VA Regional Office (VARO). This action allows the VARO to again review their decision and consider the additional evidence acquired as a result of the remand action. However, if after securing the evidence requested in the remand action the VARO still refuses to allow the benefit, the case is then returned to the BVA for final appellant action.

The Veterans of Foreign Wars is fully aware of the BVA appeals process...as we actively participate in all phases of the DVB/BVA adjudicational process:

- The VFW fully complies with all provisions of sections 3401-3405 of title 38 of the United States Code (USC) and sections 14.626-14.631 of title 38 of the Code of Federal Regulations (CFR).

- The VFW maintains a full-time complement of appeals consultants actively presenting cases to the BVA.

- The VFW offers full-time Department Veterans Service Officers located in every State and VA Regional Office.

- The VFW has a full-time cadre of Field Representatives who monitor VA activities and recommend necessary program improvements.

- The VFW offers an excellent training program, designed to continuely upgrade, educate and update our Service Officers and Appeals Personnel.

- The VFW represents approximately 6,000 veteran cases a year before the BVA, and will accept and represent all VA benefit issues.

The Veterans of Foreign Wars has an active and long standing commitment to all veterans who have served our great nation. We are constantly striving to improve the quality of the VA's benefit and health-care system and the quality of our own veteran service personnel and representatives.

When the VFW appears before this Subcommittee to give testimony on BVA operations, **WE SPEAK FROM EXPERIENCE.** We do not pretend to know all the answers but at least we have a proven record of actually serving and helping veterans. The money allocated for VFW veteran service activities is actually spent helping veterans and certainly not spent in a campaign to smear the very agencies responsible for serving veterans. We work always to build...never to destroy.

This oversight hearing was convened to again review:

1. timeliness of the appeals process;

2. quality of the appeals function;

3. staffing levels at the BVA;

4. procedures of operation at the BVA; and

5. allegations of impropriety made in litigation filed by another organization.

**TIMELINESS**

Current statistics indicate that the BVA is continuing to maintain an acceptable level of timeliness. Their current response time is approximately 134 days. Response time is calculated from the date an appeal is certified to the Board until the date of the Board's decision. After noting the number of appeals advanced for BVA consideration and the number of Board sections now in place, it is our considered opinion that the BVA is handling the case load in a most timely fashion.

The VFW recognizes that the BVA is making substantial efforts to expedite final decisions once a case is certified and received by the Board. However, before an appeal is sent to the BVA, much time is needed to fully develop the appeal; statistics indicate that on the average 278 calendar days are spent by the VAROs perfecting an appeal. Therefore, it now takes on the average of 412 days, or just under 14 months, from the time the veteran initially files the Notice of Disagreement with a VA decision until he finally receives a decision on the appeal. The BVA renders a final decision on approximately 42,000 cases per year utilizing only 21 Board sections with each section working approximately 2,000 hours per year. The figures indicate that each Board section is producing one final decision every working hour. After considering all factors, it appears that the BVA is performing its function in a timely fashion. Our other main concern, of course, is that due process be protected and sufficient time be taken to allow for a quality decision.

## QUALITY

Ideally, a veteran claimant will receive a just decision, rendered in a timely manner, from the BVA and the VA. Timeliness is important but not nearly as important as a thoroughly reviewed and properly considered final decision--a quality decision. We can understand delays in timeliness but we should never allow the pursuit of timeliness to overshadow the absolute need for first-class quality decisions.

The VFW believes that the record shows that the BVA is making a concerted effort to continue and improve the quality of their final product. The BVA's quality review program is designed to examine decisions made by a board section, analyze decision found lacking, and correct any significant errors. The VFW again compliments the Board on their quality review program and ask that they continue to strive for the best possible decision and allow any reasonable doubt in favor of the veteran.

The quality of the appeals function at the Field Stations (VAROs) is also a subject of this hearing. As we alluded to earlier in this testimony, an average of 278 calendar days or approximately two-thirds of the time needed to completely process an appeal to final resolution is spent at the VARO before the appeal is even certified to the BVA. This appears to be a very long processing time and certainly contributes to the discontent often voiced by veterans waiting for a final decision. Certainly, some form of time constraint could be put in place to standardize the amount of time expended processing an appeal prior to the final certification to the Board. We realize that the VA's Adjudication Division has undergone some extensive staffing reductions in the past few years and this would logically impact on the timeliness and the quality of their final product. The VFW has testified on this problem on numerous occasions before this Subcommittee and our VFW Service Officers overwhelmingly suggest that sufficient staffing, training, and funding be provided at all VAROs to ensure that every adjudication activity is able to provide the veterans they serve with a timely response and a quality product.

## STAFFING LEVELS

The professional staffing levels at the BVA appear to be adequate, however it should be noted that there is insufficient administrative (support) staff to handle the high volume of cases in a expeditious manner. Because of the lack of adequate personnel in the control rooms, cases are often delayed in their timely transfer to veteran service groups and the Board sections. This lack of adequate quality support personnel has resulted in problems such as: misplaced cases, misplaced hearing transcripts, and unnecessary delays in processing. Increased support staff properly utilized would serve to improve timeliness and quality.

## OPERATION PROCEDURES

The BVA is composed of a select group of highly educated and knowledgeable men and women. The background and experience of the Board members is extensive and speaks well of their qualifications to make the right decisions. The VFW is satisfied that the Chairman and BVA staff members are working toward improving the quality and timeliness of the appeals process and we trust that professional judgment and ethics would certainly be a positive influence on their job performance.

The Chairman has recently come under fire for some of his management practices and motivational techniques. The VFW is not in the business of second guessing the BVA's management decisions nor will we attempt to micro-manage their internal administrative practices. We are confident that the quality review procedures now in place, along with the ethical requirements expected of law and medical professionals, does adequately provide adequate research, review, and preparation of individual decisions.

The VFW does have one final concern: Outstationing of certain Board sections. We have appeared on numerous occasions during the past few years to site the importance of consolidating BVA operations under one roof. Currently seven Board sections are housed three blocks away from the main building because of space allocations. Duplicate services (a mini-BVA) has been set up to accomodate these orphan Board sections. A shortage of space is given as the reason why seven Board sections must be outstationed, but it is

interesting to note that other less vital VA operations continue to occupy space in the current BVA Headquarter's building. The situation of outstationed Board sections with the required duplication of services should not be tolerated. If the Board cannot be reunited into the headquarters location, then perhaps it is time to move the remaining 14 Board sections into a location sufficient to handle all 21 Board sections and support staff.

**IMPROPRIETY ALLEGATIONS**

The Veterans of Foreign Wars of America does not wish to comment on litigation currently before the courts.

Veteran service organizations have worked very hard to create, protect, and improve veteran benefit and entitlement programs and would consider litigation only if no other recourse remained.

Lawsuits against the VA are not the answer nor will they solve or improve service to veterans...litigation can only serve to diminish or even destroy the veterans benefit system.

STATEMENT BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE

COMMITTEE ON VETERANS' AFFAIRS, U. S. HOUSE OF REPRESENTATIVES

BY

CHARLES M. WILLIAMS, EXECUTIVE DIRECTOR

AMERICAN EX-PRISONERS OF WAR

WITH RESPECT TO

OVERSIGHT HEARINGS ON THE OPERATION OF THE

BOARD OF VETERANS APPEALS

WASHINGTON, DC AUGUST 11, 1988

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE

On behalf of the 30,000 members of the American Ex-Prisoners of War, and the 75,000 former prisoners of war that we represent, I want to assure you that the quality and the timeliness of services provided by the Board of Veterans Appeals are not only of vital concerns, but they continue to be thorns in the side of the former prisoners of war.

We regret to say there has simply been no discernible improvement in the VA adjudication services since PL 97-37 became law in 1981. As you know, that landmark legislation was in response to facts generated to a considerable degree by VA's own excellent 1980 report. It documented that long-term health consequences would frequently occur, and that POWS invariably lacked adequate service records concerning injuries and illnesses suffered during confinement. The practical problems of POWs obtaining fair and equitable resolution of their legitimate claims were recognized by Congress which sought then, and via later legislation, to correct. The VA POW Advisory Committee established by that legislation has repeatedly affirmed that the adjudication procedure, as implemented, is not effective for many deserving POWS.

Of course, the sad part of all this is that VA does not recognize, or admit that there is a problem. Unfortunately, it starts in the region with a faulty adjudication, and is compounded by BVA when it denies an appeal to correct a flawed initial rating.

The Veterans Administration opposed the addition of anxiety states in what was later to become PL 97-37 and has either opposed, or not supported the addition of residuals of frost-bite, traumatic arthritis, peripheral neuropathy, ulcers and spastic colon - all conditions occurring at a higher rate within the POWS we represent.

The VA has continued to insist that these additions to the presumptive list that we have worked to gain for our fellow POWS are "unnecessary", that these conditions are already being granted on a direct basis upon review of "available" medical evidence. Mr. Vogel, Chief Benefits Director, so testified as late as June 30, 1987 before the Senate Committee on Veterans Affairs as have his predecessors at every opportunity. We note that Mr. Vogel in that testimony prefers to say "may be presumed" rather than "shall" as is written in the law. This also is used in the field. As the POW Advisory Committee has noted "may", as used by VA is permissive rather than directive as Congress intended except in those cases rebuttable to inter-current evidence. We have repeatedly pointed out the extremely poor data system VA continues to use to "monitor" adjudication action on POW claims. Evidence that VA is content with the "quality" of its data and satisfied with its analysis is clear. VA finds no problem, potential or otherwise, in the fact that, from October 1, 1981 to January 1, 1987, 91,596 POW claims for

diagnosed conditions were denied while 23,700 were "granted or increased". VA improperly groups "granted or increased" together, but few claims are actually newly granted except for "anxiety states" which comprised 41% of that 23,600 total.

In a letter to Congress, dated June 23, 1986, VA acknowledged there were 5,585 denials of gastrointestinal conditions closely allied to and including spastic colon. Only 289 had been granted or increased for a denial rate of 95%!

Since 1972, the VA has indicated burden of proof to be with the VA. This was and is to assure former POWS fair and equitable resolution of their claims where history has shown records to be inadequate, and in most cases, totally lacking. It has been stated that mere suspicion or doubt is not a justifiable basis for denying a claim. YET ADJUDICATORS REPEATEDLY TELL OUR NATIONAL SERVICE OFFICERS that they cannot apply these concepts without more explicit instructions from Central Office. Then, to rub more salt into the wound, BVA denies an appeal of an adjudication based upon a violation of Central Office directives.

In summary, we find a continuing and unchanging pattern in VA's actual adjudication of POW claims that, except for psychiatric conditions under presumptive provisions, simply do not assure a fairminded and just resolution of those claims.

There is a pervasive attitude that most new claims of POWS are unwarranted, even exploitive, which adversely affects the quality and timeliness of VA services to former prisoners of war at all levels.

The Department of Medicine and Surgery, in stark contrast, has been genuinely open and responsive to the needs of POWS for health care services. It accepts the need for change, corrects deficiencies, and has earned the confidence of POWS that it is determined to provide quality and timely services. We know that there are many conscientious and dedicated employees in VA who, with more positive leadership and more explicit directions, would provide quality and timely service.

It is indeed unfortunate that VA is still more interested in Gramm-Rudman-Hollings, than it is in providing honest and fair adjudication of the claims of former prisoners-of-war.

THANK YOU.

STATEMENT OF

JOHN C. BOLLINGER, ASSOCIATE LEGISLATIVE DIRECTOR

PARALYZED VETERANS OF AMERICA

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION, AND INSURANCE

OF THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

CONCERNING THE

OPERATION OF THE BOARD OF VETERANS' APPEALS

AUGUST 11, 1988

Mr. Chairman and Members of the Subcommittee, it is a pleasure for me to be here today to present the views of Paralyzed Veterans of America (PVA) concerning the operation of the Board of Veterans' Appeals (BVA). On behalf of the members of PVA, I wish to thank you for conducting this important oversight hearing. We specifically appreciate the opportunity to express our concerns about the variety of issues addressed in your letter of invitation.

It is clear that oversight examination and evaluation of the BVA is essential. Acting as the Veterans Administration's (VA) final authority on all VA claims, the Board is ultimately responsible for ensuring that all VA benefits authorized by law are properly granted to eligible veterans and their families. The efforts of this Subcommittee to examine and evaluate the operation of the BVA will help to ensure that such claims receive complete and just review.

PVA's ability to offer credible testimony today is due, in large part, to our own on-going oversight capacity regarding the BVA. Since first being chartered by the Congress in 1971, PVA has developed an extensive veterans' service program which, without charge, has assisted thousands of veterans and their families process claims for VA benefits. Our Veterans' Benefits Department includes 84 professionally trained service officers and 50 support

staff, four National Field Directors, and four Appeals Officers operating from 58 locations throughout the United States. We work for veterans by helping them develop their claims, advising them of the merits of a specific case, and representing them before the VA at both the Regional Office (RO) and BVA level. In working with the veteran and the VA, we are able to closely monitor both the quantity of veterans' claims being submitted to the Agency and the quality of the VA's ability to adjudicate those claims in a prompt and just manner. It is in this oversight capacity that we are pleased to present our testimony today.

I initially wish to discuss several recent actions taken by the BVA involving management techniques and operations. We congratulate Chairman Kenneth E. Eaton for recognizing and addressing the controversial issues of bonuses and production quotas, "courtesy signatures," and the "Chairman's Signature List."

As you are aware, for many years the BVA has employed the use of production quotas and bonuses to encourage and reward BVA members for meeting caseload demands in specified periods of time. Bonuses were rewarded for exceeding the production quotas and, to some degree, on the quality of the decisions.

PVA believes that bonuses and production quotas may indeed be perceived in a negative manner. Such perceptions may likely result in an environment of mistrust or, at the very least, raise questions regarding the Board's thoroughness and fairness. We do not believe, however, that "production quotas" have actually compromised the quality of work at the BVA. We believe the decision to eliminate bonuses and production quotas represents a responsible resolution to this controversial management technique.

With respect to "courtesy signatures," or third reviews, PVA recognizes the possible need for a Board Member, not originally assigned to the case, to sign his or her name to a final decision. We oppose, however, the practice of carte blanche signatures without proper review of the case. We support the Chairman's recent efforts to ensure thorough reviews by such individuals responsible for third reviews. PVA feels very strongly that third reviews should entail a complete understanding of the evidence, facts, and disposition of a case before a third signature is affixed to the final decision. It is essential that a veteran and his representative be

absolutely certain that their case has not been "rubber stamped." Allegations that Board Members sign decisions without reviewing them must be put to rest, and we encourage the Chairman to strictly enforce his memorandum of May 1988 regarding the necessary and appropriate time needed to review cases.

Just several weeks ago, in June 1988, the Chairman discontinued the use of the "Chairman's Signature List." PVA recognizes that Congressional inquiries merit the same priority response from BVA as they do when directed to any other federal agency or department. Such a list, however, is just another example of perceived inequity at the Board, and we believe it was proper to eliminate the practice. Once again, we do not believe that the list compromised the quality of work at the BVA.

Over the years, PVA has found the VA's claims and appellate process to be basically equitable and just. For the most part, the system does work. We believe the Agency has the veteran claimant's well-being in mind. Likewise, we have trust and respect for the Board of Veterans' Appeals whose highly competent members seek to interpret title 38, United States Code, and all governing VA regulations in a fair and equitable manner. This is not to say, however, that the timeliness and quality of the adjudication and appeals process at both the field stations and BVA levels could not be improved.

PVA has been concerned in recent years that, due to budget cuts, severe staffing reductions, and increased complexity of claims before the regional offices, the agency has become less responsive in its timeliness and accuracy in claims processing. In the case of the BVA, we believe that this Subcommittee and the Congress acted wisely in 1983 with the passage of legislation which ultimately resulted in Public Law 98-223. This law provided authority to increase the membership of the Board of Veterans' Appeals from 50 to 65 and raised the number of BVA full board sections from 17 to 21. We believe that this action has gone a long way in enhancing both the quality and the timeliness of the BVA appeals process and in sub-stantially reducing the serious preexisting backlog of cases and delays in processing.

Averaging over 40,000 cases per year for the last five years, the BVA now reports a response time of approximately 130 days from the time a case is received until a final decision is achieved. We believe this is a reasonable length of time for the Board to review a case without compromising quality standards. We are very concerned, however, with the overall elapsed processing time from the point of the Notice of Disagreement until the BVA's final decision. This, of course, reflects the inability of DVB to adequately meet basic quality and timeliness standards during the appellate process.

Far too many administrative errors, resulting in time consuming remands, are being made. The failure of regional offices to obtain current medical information from private physicians and VA medical centers, also results in lengthy remands. Approximately 20 percent of all cases are returned to the regional offices for corrective and additional action. Although we believe an increased number of remands may be due, to some degree, to the expanded number of board members who can detect substantive and procedural errors, the major cause of the increased remands is due to the nationwide reduction of FTEE in the Department of Veterans' Benefits over the past ten years. Although we believe that remands generally operate to the benefit of individual claimants and reflect full due process, regional office errors, both substantive and procedural, have a significant adverse effect on timeliness as it pertains to the whole appellate process.

Although the fundamental problem of inadequate FTEE handling extremely heavy workloads constitutes the core of the timeliness issue, we are pleased that the Board and DVB have made a combined effort to identify and improve upon several problem areas within the appellate process. We do not believe that a reduction in the remand rate should necessarily be the ultimate goal of DVB and the BVA. Rather, quality and timeliness factors should be addressed throughout the system with all efforts aimed at improving both areas. If the number of remands decrease as a result of such efforts, then we believe this will be appropriately viewed as a positive result.

As we and our fellow VSO's have testified on numerous occasions in the past, both BVA and RO quality and timeliness issues are, of course, directly related to staffing requirements. One of the criticisms aimed at the Board in recent years concerns panel members and staff attorneys engaging in informal consultations with physician panel members in order to obtain

specific medical information on a case. We believe the addition of several medical advisors, accessible to all panel members, would relieve a great deal of this criticism. Such consultations could then be reflected in the decision opinion without overburdening existing medical staff. The necessity of including such consultations is especially important when the Board's final decision is based strictly on medical issues and not legal ones. We believe a veteran and his representative should have access to the entire decision-making process behind the final decision.

PVA appreciates the action of this Subcommittee in rejecting the Administration's proposed cuts in DVB staff funding. We applaud your concern for the VA's appellate process in holding this oversight hearing on an issue so important to all veterans who find themselves in disagreement with regional office decisions.

The Honorable G.V. (Sonny) Montgomery, Chairman, House Committee on Veterans Affairs, will hold a legislative hearing on September 8, 1988, regarding judicial review of veterans' claims. The bills to be considered address several improvements to the role and function of the Board of Veterans' Appeals. We certainly understand this Subcommittee's intent to maintain the boundaries of today's hearing within an oversight function. We appreciate the opportunity to be here today, and we look forward to appearing before the full Committee in September. PVA believes there are several excellent provisions in the proposed legislation relating directly to the BVA. There are other provisions which represent unique and novel approaches to change within the BVA and must be carefully analyzed and evaluated.

Once again, we appreciate this opportunity today and are hopeful that our collective efforts will ultimately result in an improved Board of Veterans' Appeals. That concludes my testimony, Mr. Chairman. I will be pleased to answer any questions you may have.

STATEMENT OF
RICHARD F. SCHULTZ
ASSOCIATE NATIONAL LEGISLATIVE DIRECTOR
DISABLED AMERICAN VETERANS
BEFORE THE
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
OF THE
HOUSE COMMITTEE ON VETERANS AFFAIRS
August 11, 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the more than 1.1 million members of the Disabled American Veterans, and its Ladies' Auxiliary, I wish to express our deep appreciation for the opportunity to present our views relative to the operation of the Board of Veterans Appeals (BVA).

Initially, Mr. Chairman, the DAV wishes to commend you and the members of the Subcommittee for holding this oversight hearing on the operation of the BVA. Today's hearing represents the second such hearing by the Subcommittee in the 100th Congress -- a clear indication of the Subcommittee's commitment to assuring that our nation's disabled veterans and their families receive their legally entitled benefits.

As you may know, Mr. Chairman, the DAV was founded on the principle that this nation's first duty to veterans is the rehabilitation of its wartime disabled. It therefore follows that our primary concern is to assure that America's service-connected disabled veterans, their dependents and survivors, receive the VA benefits and services to which they are entitled. DAV services are not, however, restricted solely to service-connected veterans, as we offer counseling and representation to all veterans and their families in any claim they may pursue for benefits administered by the Veterans Administration.

In order to assure that our nation's veterans and their families receive VA benefits to which they may be entitled, the DAV employs approximately 260 full-time, professionally trained, National Service Officers (NSOs) located throughout the country. While DAV NSOs provide counseling on a wide range of VA benefits and services, the majority of their activities are dedicated to assisting veterans on claims for compensation and pension at VA regional offices (VAROs).

To insure that each individual VA claimant receives complete and thorough DAV representation throughout the claims processing system, the DAV also maintains a National Appeals Office here in Washington, D.C. This office is staffed by nine highly skilled National Appeals Officers (NAOs) whose primary responsibility is to assure, in all cases where the DAV has been appointed as the individual's representative, that each appeal is clearly articulated to the Board of Veterans Appeals. DAV NAOs also initiate requests for reconsideration of BVA decisions where we believe there has been an error in the Board's decision.

Mr. Chairman, as you know, "The mission of the Veterans Administration is to serve America's veterans and their families with dignity and compassion and to be their principal advocate in insuring that they receive the care, support and recognition earned in service to this nation." Also, the VA's Department of Veterans Benefits (DVB) is charged with the responsibility of insuring "that an appropriate level of benefits is provided within the law to eligible veterans and beneficiaries."

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In order to insure that DVB, through its regional offices, is granting all benefits authorized by law to veterans, their dependents and survivors, there exists a Board of Veterans Appeals. The objectives of the BVA appellate program, as outlined in MBVA-1, Part I, are as follows:

1.04 Objectives of the Appellate Program

A. Major. Major objectives is to equitably decide appeals under all laws administered by the VA, with sympathetic understanding and as expeditiously as possible consistent with quality, in order to grant all benefits to which veterans and their dependents are entitled.

B. Specific. Specific objectives are:

1. To promulgate quality decisions which are equitable, comprehensive, fully reasoned and self-sustaining.

2. To maintain a high level of promptness in deciding appeals consistent with the quality of decisions expected of an appellate agency of last resort.

Mr. Chairman, aside from an administrative service which handles the support functions and activities, BVA appeals are addressed by a Professional Service presently composed of 21 Board Sections. Each Board Section is composed of three members: a chief member (attorney), a medical member (physician), and a legal member (attorney). In addition, each section has assigned to it approximately six "attorney reviewers" and a secretary.

Quality Review

In an effort to assure that our nation's veterans and their families receive fair and equitable decisions on their appeals, the Board of Veterans Appeals has in place a two level quality control system.

Initially, all BVA decisions are subject to a review by the Appellate Index and Retrieval Staff (AIRS). This staff, composed of attorney counselors from all Board Sections on a rotating basis, has the primary responsibility to conduct an editorial review looking for typographical and format errors. Cases found to be in error are then referred to the Office of Quality Review.

The Office of Quality Review, consisting of two Deputy Vice Chairmen and a secretary, review all cases referred to them by AIRS, as well as a random selection of all other decisions rendered by BVA.

Mr. Chairman, we believe the Board of Veterans Appeals' quality review system represents an effective means to insure that our nation's veterans receive fair and equitable treatment under the laws administered by the VA.

Timeliness

Mr. Chairman, as you know, the caseload of the Board of Veterans Appeals has continued to increase over the years. In an effort to alleviate the increasing number of backlogs, Congress took action which resulted in the passage of Public Law 98-223. This law, in part, provided for an increase in the number of Board members from 50 to 65, representing a 30% increase in Appeal Board membership. While the problem of processing time at BVA has abated somewhat, the time it takes

veterans to receive a decision on their appeals (from Notice of Disagreement through final action by BVA) continues to remain unacceptably high (412 days for the first three-quarters of Fiscal Year 1988).

The major portion of the delay in processing appeals rests not with the Board of Veterans Appeals, but at the VA regional office level. Of the 412 days noted above, 279 days are spent at VA regional offices and 133 days at BVA. In this regard it is significant to note that regional offices, since Fiscal Year 1978, have experienced a 38% reduction in DVB FTEE, without a corresponding decrease in workload. It is also important to note, Mr. Chairman, that BVA processing time decreased with the addition of staff, while DVB processing time has experienced a corresponding increase as their staff has been reduced.

Remands

Mr. Chairman, the DAV believes the steady increase in the number of cases remanded by BVA in recent years is the result of a number of factors. First and foremost, is the inadequate staffing and funding for training of VA regional office adjudication personnel. This situation has driven VARO personnel to become more concerned with meeting production requirements. As a result, far too many cases are certified to BVA when they are not fully developed, even when this fact has been pointed out to VARO adjudicative personnel by veterans' service organization representatives.

Another factor that has influenced the increase in the number of remands is the aggressive representation by service organization representatives, both at the VARO level and at BVA. The DAV strongly believes the influence of our intensive training program has clearly improved upon the quality of representation afforded VA claimants.

It is also important to note that during the first three quarters of Fiscal Year 1988, 21.2% of all cases remanded by BVA to regional offices were subsequently allowed by those offices. Unquestionably, the increase in the number of remands has benefitted VA claimants.

* * *

Mr. Chairman, in your letter of invitation you requested our views on allegations of impropriety in the decision-making process, and issues surrounding pending litigation relative to these allegations.

From information provided at previous hearings before this Subcommittee, the DAV is well aware of the circumstances that appear to have led one organization to take BVA to court. Since DAV has not seen the papers filed in this legal action, we are unable to comment on its merits. However, we believe it important to point out that this action is a prime example of how our judicial system works for veterans. Also, it is interesting to note that federal courts do accept cases where it is alleged that a broad category of veterans are being denied their benefits.

That aside, we would like to comment briefly on some of the circumstances mentioned above, i.e., bonuses paid to Board members, the Chairman's signature list, blade cases and courtesy or third person signatures.

As we have stated in previous Congressional testimony, the DAV believes the cash bonuses paid to BVA Board members for achieving established production goals does create a perception that quantity, rather than quality, of decisions is more

important. While we firmly believe this is not the case and, in fact, BVA diligently strives for quality decisions, nonetheless, we believe the use of such production goals is unwise. In that regard, we are pleased to note that the policy of paying bonuses at BVA has been terminated.

We are also aware that the use of the Chairman's signature list was recently discontinued. Quite frankly, we do not believe that the purpose of the Chairman's signature list was to extend preferential treatment to any member of Congress, including those on the Chairman's signature list, nor to influence the outcome of the Board's decision on the veteran's appeal.

Mr. Chairman, as you know, Chief Board Members at BVA are responsible for managing the cases that have been assigned to their sections. We are aware that senior attorneys are routinely assigned and are responsible for more complex, time consuming cases in a section. Therefore, because such cases impact adversely upon these senior attorneys' ability to meet their production goals, Chief Board Members also assign the so-called "blade" cases to these individuals in order that they may continue to meet their production goals. It appears to us that such a practice is merely good management and proper workload distribution and not, as has been alleged in prior testimony, an abuse of power.

The practice known as "courtesy signatures" does occur at BVA in certain situations. Specifically, we believe this occurs when acting physician panel members who, due to statutory restrictions contained in Section 4002(B), Title 38, U.S. Code, are limited to working no more than 270 days during any twelve-month period.

Apparently, due to the lengthy process employed by BVA to evaluate and obtain full-time appointments for these individuals, the above cited statutory limitations come into play. That is to say, these acting physician panel members continue to fulfill their duties on the Board but are unable to affix their signatures to the opinions they provide. Consequently, another panel member is requested to sign the opinion as a "courtesy," if you will, for the physician panel member who is awaiting full-time appointment.

In our opinion, if the BVA decides to obtain full-time appointment for a physician panel member after they have carefully and completely evaluated the individual, such appointment should automatically coincide with that determination.

While we are aware that BVA has recently taken action to hire additional physicians, we would urge the Subcommittee to seriously consider amending Section 4002(B), Title 38, U.S. Code, thereby eliminating the need for this practice to take place.

Mr. Chairman, as is evident by recent actions taken by BVA, when it is pointed out that a specific practice or policy is perceived to be improper, they have responded to alleviate that perception.

While on the topic of perception, I would like to briefly expand on that topic as it relates to BVA.

As you know, one criticism levied against the current operation of BVA is its inability to render impartial decisions while, at the same time, be subject to the Administrator of the VA and VA General Counsel decisions.

To alleviate this concern, Senator Murkowski, Ranking Minority Member of the Senate Veterans Affairs Committee, introduced legislation (S. 2292), supported by the DAV, which, among other things, would make BVA a truly independent entity, thus eliminating the appearance that BVA decisions are somehow influenced by considerations other than the merits of an individual's appeal.

Mr. Chairman, we strongly recommend that this Subcommittee consider legislation similar to that introduced by Senator Murkowski which will make BVA truly independent of the VA Administrator. This, we believe, will go a long way to assure veterans that their appeals to BVA are truly independent decisions, rendered outside the VA adjudicative process that originally denied their claims.

In conclusion, Mr. Chairman, we believe the BVA renders fair and equitable decisions consistent with applicable laws and that the so-called perceptual improprieties by BVA are unfounded. Nonetheless, we do recognize the importance of perceptions and it is in that context we support BVA's efforts to eliminate any perceived impropriety, as well as legislation which would make it easier for BVA to hire additional physicians and make the Board a truly independent entity.

Further, we believe that in order to reduce long delays in veterans' appeals, the Department of Veterans Benefits staff must been increased and sufficient funding must be provided for their training.

This concludes my statement, Mr. Chairman. I again wish to thank you and the members of the Subcommittee for allowing the DAV to present its views on the operation of the VA's Board of Veterans Appeals.

STATEMENT OF PHILIP R. WILKERSON, ASSISTANT DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
COMMITTEE ON VETERANS AFFAIRS
U. S. HOUSE OF REPRESENTATIVES
AUGUST 11, 1988

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates the opportunity to offer comment on the current operations of the Board of Veterans Appeals.

Before proceding with our comments this morning concerning certain aspects of the operations of the Board of Veterans Appeals, we have been informed that the full Committee will hold a hearing on September 8, 1988 on the subject of judicial review. This issue has been of particular interest and concern to The American Legion. As a result of the organization's reexamination of our position on the subject of judicial review, the National Executive Committee of The American Legion approved Resolution No. 34 on May 5, 1988 setting forth a series of proposals that would, among other things, expand and better define the procedural rights of benefit claimants before the Board of Veterans Appeals.

Subsequently, on July 13, 1988, H.R. 5039, "The Veterans Reassurance Act of 1988" was introduced by Chairman Montgomery and Representative Solomon. This legislation will have profound implications for the status of and determinations by the Board. It sets forth specific amendments to title 38, United States Code, to affect certain improvements in basic claims and due process procedures. It will also make the Board of Veterans Appeals completely independent of the Veterans Administration, enact various reforms in the Board's procedures and expand its jurisdiction to provide for limited judicial review of VA regulations and other constitutional issues.

This legislation, we believe, will address in a very direct manner a number of operational problems at the Board of Veterans Appeals relating to the "quality" of the Board's decisions and the claimant's rights to due process which are the focus of today's oversight hearing. We will, therefore, limit our comments today to issues relating to the current high rate of remand by the Board of Veterans Appeals and the medical expertise in those Board sections responsible for PTSD cases.

With respect to the remand rate, over the last three years there has been a sustained increase in the percentage of appeals which have been remanded back to the office of original jurisdiction for additional evidentiary development and to accord the claimants full due process in their appeals. The remand rate has risen from 16.3% in FY 1985 to 20.7% in FY 1987. In the preceding three years, however, the remand rate had

been declining. In the view of The American Legion, the change in the remand rate from one of gradual decline to one of substantial increase, to the point of being more than one in five, has been due in part to an erosion of the quality of the decisions rendered by VA regional offices. One of the primary factors contributing to the declining quality has been the persistent and consistent personnel cuts in field station personnel during the corresponding three year period. The reductions in personnel mandated under the recent operating budget for the regional offices have been affected by various means. Apart from staff turnover and attrition, there have been large numbers of retirements among senior adjudicators and rating board personnel known as the "Class of '46." These highly experienced and knowledgeable individuals, who joined the Veterans Administration in the period immediately following World War II, are now completing or have completed their government careers. Although, in the main, those employees who are replacing them are dedicated and hardworking, the level of expertise and knowledge cannot be replaced or duplicated overnight. The Department of Veterans Benefits has been constrained in their training efforts by a lack of funds for training and related travel.

In a recent report on remanded cases, the Chief Benefits Director indicated that in a large percentage of the cases reviewed the reason for remand was to accomplish special examinations. It was also found that the regional offices did not always ensure that all records were incorporated in the files at the time cases were certified to the Board of Veterans Appeals; the regional offices did not always address all of the issues raised by the claimant; and the Board of Veterans Appeals, in some instances, remanded cases for information which was superfluous to the issue(s) on appeal.

In discussing the problem of development of appeals at the regional office level with our service officers, many have expressed a recurrent complaint of rating boards or adjudicators denying complex cases rather than undertaking additional development which is considered to be essential to a full and fair consideration of the claim. The reason most often given (informally) was that "they" (the regional office) could not do it, but the Board of Veterans Appeals could. There was an apparent fear of criticism by officials in Central Office, if such a case were to be allowed. This rationale is unacceptable to The American Legion. Claimants should not be forced into the lengthy appeals process for these reasons.

Another situation which we feel sometimes creates unnecessary appeals is where the claimant or accredited representative has formally raised an issue or question as to the interpretation or application of the pertinent regulations or manual provisions, or

where there is a highly complex medical question. Many times there is an extreme reluctance on the part of the regional office in acceding to a request for an advisory opinion from the C&P Service or the Department of Medicine and Surgery. Again, we strongly feel that claimants should not be forced into an appeal which may be unnecessary, since such expert technical or medical opinions cannot be obtained by the claimant from sources outside the agency. The American Legion's position is that the regional office must shoulder its full responsibility to the claimant in resolving such issues.

The remand rate reflects the Board of Veterans Appeals concern for due process and a determination that additional development of certain evidence in a case is both desirable and necessary. This is clearly to the advantage of the claimant, as confirmed by the fact that at least 20% of those cases remanded are allowed following completion of the required development and readjudication. In those remanded cases recertified to the Board of Veterans Appeals following development, the allowance rate is substantially higher than the current allowance rate of 12.8%.

With regard to the specialties of the medical members of the Board of Veterans Appeals and the jurisdictional specialties of the Board section to which they may be assigned, The American Legion is concerned by the fact that there appears to be very limited psychiatric expertise on the Board, and this is particularly evident on the several sections responsible for handling Post-traumatic Stress Disorder cases. According to available information, the medical specialties of the physicians on these sections include neurology, internal medicine, OB/GYN, and family practice.

This situation, for example, raises the possibility, or at least the perception rightly or wrongly, that decisions denying service connection for PTSD have been made by physicians with negligible training, clinical experience, or expertise in the field of psychiatry. The question of qualification becomes a critical issue in the reconciliation of diagnoses contained in the record. The Board member may well be less qualified medically than the psychiatrists or psychologists who have actually examined, diagnosed or treated the veteran.

It is noted the Board of Veterans Appeals has made an effort to hire and assign physicians with certain specialties. Some examples include a specialist in internal medicine and hematology to consider AIDS cases, a specialist in radiology to handle radiation claims, a specialist in pulmonary medicine to consider asbestos exposure cases,and a specialist in thoracic and vascular surgery to the section considering gunshot

wounds. However, it appears that there is only one psychiatrist on the entire Board. Under such circumstances, we question how the Board can assure veterans that their claims receive a full and fair consideration.

Mr. Chairman, that concludes our statement.

Vietnam Veterans of America, Inc
2001 S St., NW
Suite 700
Washington, DC 20009-1125

(202) 332-2700

Statement Of

VIETNAM VETERANS OF AMERICA, INC.

Presented By

RICHARD E. O'DELL
VICE PRESIDENT
and
CHAIRMAN OF VVA'S COMMITTEE ON ADVOCACY

and

PAUL S. EGAN
LEGISLATIVE DIRECTOR

Before the

HOUSE VETERANS AFFAIRS SUBCOMMITTEE ON
COMPENSATION, PENSION AND INSURANCE

on

OPERATIONS OF THE BOARD OF VETERANS APPEALS

AUGUST 11, 1988

Mr. Chairman and members of the Subcommittee, the Vietnam Veterans of America, Inc. (VVA) is pleased to have this opportunity to present its views on the process of VA claims adjudication carried out by the Board of Veterans Appeals (BVA). As you know, this is a subject to which the VVA has devoted a considerable degree of attention over the course of the last several months. It is also a subject to which the Congress, as well as the media, have devoted significant attention. Since this subcommittee held its last hearing on the BVA last October 6, we have testified on this subject three other times; at a February 18, 1988 hearing by the Governmental Operations Subcommittee on Human Resources and Intergovernmental Relations, at an April 28, 1988 hearing before the Senate Veterans Affairs Committee, and again at a June 9, 1988 hearing before the Senate Veterans Affairs Committee.

What we have learned about the operation of the BVA over the course of our several month examination culminated on May 5, 1988 in a lawsuit filed by the VVA against the VA. Addended to this statement is a copy of the complaint filed in U.S. District Court for the District of Columbia. (Attachment 1) While this lawsuit can be expected to proceed over the next several months before it is finally resolved, it is certainly worth noting that the BVA has attempted to moot the charges brought in this lawsuit concerning two of these practices by declaring that they have been terminated abruptly, presumably because the VA itself acknowledges the impropriety of these practices. The first of these involved providing financial incentives to Board members in the form of cash bonuses for individuals meeting or exceeding production quotas. Chairman Eaton tentatively suspended one aspect of the incentive program on June 7, 1988. However, we believe that the inderlying practice of rewarding BVA members for high production of

cases is continuing. The second practice involved what was termed the "Chairman's personal signature list". This was a list of select members of the House and Senate whom, we believe, upon inquiring as to the progress or status of a specific claim, are given special consideration by the BVA Chairman. Chairman Eaton has rescinded the latest version of the signature list however, we believe the practice of preferential treatment will continue. We have also attached to this statement a copy of Chairman Eaton's Declaration in the lawsuit and the Affidavit of retired Chief Board section member Daniel J. Bierman. (Attachments 2 and 3)

Mr. Chairman, the committee staff has advised us that this hearing is intended to lend oversight to the BVA and that it is not intended as a forum for advancing the merits of judicial review of adverse VA adjudications. Other than a few prefatory remarks on this subject, and to the extent that we can, it is our intention to comply with the committee's intentions, although we do believe the two issues are inextricably tied.

As we examine the BVA throughout the balance of this statement we leave it to the committee's members to draw their own conclusions as to the willingness of the VA to assist veteran claimants, the nonadversarial nature of the process and just how well the system works in actuality.

Prior to the June 9, 1988 oversight hearing on the BVA held by the Senate Veterans Affairs Committee, Chairman Cranston asked several pre-hearing questions of the veterans service organizations. Many of these questions raised issues that deserve discussion in this statement because the subject matter may not have been considered by this subcommittee previously.

With respect to the sections of this statement concerning inconsistencies of Board sections, medical Board section members, Board section decision-making and independent medical opinions, some of the language describing BVA operations is derived from the contents of Senator Cranston's pre-hearing questions. The discussion of these matters, however, represents the VVA's suggestions for reform.

In our view, the VA's apparatus for adjudicating claims from the Regional Office (RO) level up through to the final appeals adjudicated by the BVA is so institutionally flawed, so weighted against the veteran, that no amount of gerry-rigging can assure fairness in the absence of judicial review. As we have seen from the proceedings of the currently pending lawsuit by the National Association of Radiation Survivors (NARS) against the VA, Regional Office decision-making is powered by production quotas and radiation claims have seemed to be discouraged systematically. Additionally, the VA's Central Office, in this case, was shown to be so unwilling to cooperate with discovery proceedings that the judge appointed a Special Master and fined the agency heavily.

As for the BVA, its mission is "to equitably decide appeals under all laws administered by the Veterans Administration and to ensure that appellants are afforded due process of law; that they get timely, complete, careful, fair and sympathetic consideration of their appeals; and that they receive all benefits to which they and their dependents are entitled".1

1 Document describing the VA's Veterans Appeals Control and Locator System (VACOLS) received from the VA as a result of a December 30, 1987 Freedom of Information Act request. (Exhibit A)

Throughout this statement, we will describe numerous apparent transgressions of this mission, each of which ultimately impairs the veteran claimant's ability to receive equitable treatment.

For veterans, the BVA is the Supreme Court of the VA claims process. Necessarily, anything that acts to influence its decision-making, apart from the merits of the claims before it, must be taken with utmost seriousness. If it can be established that the BVA is heavily influenced by factors other than the merits of the claims adjudicated, it must also be agreed that court review is indicated.

For its part, the VA has opposed judicial review before various congressional hearings over the years for a variety of reasons lacking real cogency. Among the arguments raised are; that independent review of claims is available through the BVA, that the VA system is non-adversarial allowing the VA to assist the veteran in developing his claim for benefits, that resulting court overcrowding would be bad public policy and that, after all, access to the courts is available on Constitutional and regulatory questions. From our standpoint, the claims of BVA independence and VA willingness to assist veterans in getting their claims approved are greatly overstated. Raising the problems possibly arising from court overcrowding betray a disregard for basic rights in a Constitutional Democracy. The VA's repeated claims before the Congress over the last several years that court access is available on Constitutional questions are claims the VA has contradicted in federal court and this is as troubling as it is revealing about the VA's real desire for continued unaccountability.

In a currently pending lawsuit against the VA, brought by the VVA on behalf of a class of Puerto Rican veterans, a suit alleging racial discrimination among other things, the VA has asked the court to dismiss the case. As authority for this request, the VA cited section 211 (a) of Title 38 United States Code. This is the section of law that prevents veterans from taking their disagreements with VA adjudications decisions to court. In this case, involving alleged unconstitutional denial of equal protection under the law, the VA has asked for dismissal based on the agency's view that section 211 (a) bars court jurisdiction on even Constitutional questions.2

Not only does this raise questions of the VA's reliability in expressing its actual views before the Congress, but the nature of this case suggests that VA adjucications decision-making can be manipulated by purely budgetary considerations. This particular case involves a decision by VA to undertake a massive re-review of the files of all Puerto Rican veterans rated by the San Juan, Puerto Rico Regional Office at 100 percent disabled for psychiatric reasons and subsequent unilateral reduction in benefits for those deemed by the re-review to have been rated too highly.

2 Fernando Guisti Bravo et al V. United States Veterans Administration. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss. pgs 26-30 (Exhibit B)

Significant Variances Between
Different Sections of the BVA

Kenneth E. Eaton, Chairman of the Board of Veterans Appeals, testified before this subcommittee on the operation of the BVA in 1985 and again on October 6, 1987. Mr. Eaton responded to a question from the Chairman in 1985 by saying "[y]es, indeed, it is quite true that there is what I might say is a significant variance between different sections of the Board and how they see these cases...". The VVA and The American Legion have each, in the past, pointed out similar problems. (Exhibit C, footnote 3)

During the 1985 and 1987 hearings when Mr. Eaton testified, it would have been very helpful if production statistics for each of the 21 sections of the BVA had been available. These production statistics show allowance rates, denial rates and remand rates for each of the Board's 21 sections. Had they been available they would likely have shown substantial differences in allowance rates, denial rates and remand rates between certain sections of the Board that handle similar cases.

The VVA has obtained one such document from sources within the BVA and, indeed the differences we have suspected are apparent. Allowances overall for the last quarter of FY 1987 for all Board sections ranged between 7.9 percent and 18.6 percent. Denials overall for the same quarter ranged between 55.6 percent and 82 percent. Remands ranged between 6.9 percent and 31.6 percent. (Exhibit D) The VVA believes the variations in these production statistics show that the testimony of the Chairman of the BVA regarding the "significant variances between different sections of the Board" is

indeed very significant. It is so significant, in our judgment, that it has become apparent that a higher reviewing authority ought to be made available on this basis alone in order to protect veterans from those "variances" in the decisions rendered on veterans benefits.

With this in mind, it is significant to note the commnets of retired Chief section member Daniel J. Bierman in his Affidavit associated with the VVA's lawsuit. At page 16 of the Affidavit Mr. Bierman states, Chairman Eaton has stated to me and other BVA members, including at a staff meeting on November 3, 1986, that he assigns cases to allowance-prone or denial prone panels on the basis of his expectation of the desired outcome. The practice amounts to "shopping for judges" and deprives a claimant for veterans benefits of the fair and impartial consideration which he is entitled to by law."

Moreover, not only are there variances in the decisions of the Board's sections, but equal and even identical cases are decided differently. (Exhibit C, pg. 7) This fact, attested to by the BVA Chairman, appears in direct violation of federal regulation, 38 CFR 3.101. (Exhibit E)

Required Production Quotas

Like the adjudications process at VA Regional Offices, operations at the BVA are powered by production quotas. As we understand it from available documentation, GS-9 to GS-12 staff attorneys drafting decisions for the 21 sections of the Board must attain consistent production levels of at least 100 percent in order to be typically eligible for promotion to the next higher GS level. (Exhibit F) The measure of production is based on

the amount of time it takes a staff attorney to draft a decision. The specific amount of time is prescribed in the Manual of the Board of Veterans Appeals. (Exhibit G)

For its part, the VA claims that quality considerations also go into determinations for promotions, but it is certainly clear that productivity is far easier to measure than quality. That being so, we believe production is the compelling factor.

With regard to the VA's claim that quality is an important factor in promotion, we would be very interested to know how quality is measured and what happens to an adverse decision when there are quality deficiencies. It occurs to us that quality might be measured objectively by assessing the mechanical aspects of appellate adjudications. For example, punctuation, grammar, spelling and proper use of the prescribed format might be one measurable qualitative benchmark. If so, this cannot be seen as a serious counter to the argument that production quotas power appellate adjudications at the expense of a thorough review of the veterans claim.

A more substantive measure of quality might require evaluations of thoroughness of analysis of each issue raised in a claim. Our experience leads us to conclude that quality controls in this area are lacking. If we are to assume that this is the kind of substantive quality measured at the VA, we would be very interested to know how often actual decisions are reversed for such deficiencies before they are made official. We seriously doubt that such reversals take place in anything but the most egregious cases, if at all, or that substantive quality is even measured.

Apart from VA's insistence that quality is measured and considered in promotions, there is strong evidence to suggest the contention that it does not and has not in the past. In a May 30, 1986 memorandum to the BVA Chairman concerning potential awards for Board members, the writer of the memorandum states, "[a]s an adjunct or alternative to 'production' and 'quality' awards, you may want to consider awards... based on combined effectiveness."3 If the VA really does assess meaningful quality, it seems odd that an official within the agency would find it necessary to propose quality assessment.

Nearly a year later in a May 1, 1987 memorandum by a Deputy Vice Chairman of the BVA concerning the same subject, a further suggestion to utilize quality in awards for Board members is made. In this memorandum, The Deputy Vice Chairman states "[o]nce again, I'll make my annual pitch for at least some consideration being given to 'quality' in determining performance recognition for Board Members."4

As a practical matter production quotas cause staff attorneys to draft decisions as rapidly as possible, quality controls notwithstanding. With so much attention to production, substantive quality is inevitably affected. For example, in cases of service-connection of a disability resulting from

3 May 30, 1986 Memorandum provided as a result of a December 30, 1987 Freedom of Information Act request. (Exhibit H)

4 May 1, 1987 Memorandum provided as a result of a December 30, 1987 Freedom of Information Act request. (Exhibit I)

the side-effects of medication required for the treatment of a previously service-connected disability, much time is needed for the staff attorney to list all the medications taken by the veteran and then review the Physician's Desk Reference in order to determine which medications may have caused a new disorder. Staff attorneys trying to maintain production quotas are less inclined to do this research. Since Board members rely heavily on the staff attorney's summary of the evidence, it is easy to see how qualitative mistakes can be overlooked to the disadvantage of the veteran.

Much of what we have stated here is supported by the contents of a May 8, 1987 Informal Grievance filed with the Chairman of the BVA which was signed by several members of the Board of the BVA.5 Quoting from this document at length is useful at this point.

"Instead of providing a fair and impartial system of handling the number of appeals, the Chairman is engaging in acts, practices, policies and courses of conduct to pressure Board Members and sections into increasing the number of cases being processed each year without regard to the amount of time that must be devoted to each individual case in order to give it adequate legal and evidentiary consideration and in order to render careful, correct, fair and impartial written decisions consistent with the Members' obligations to treat each claimant in accordance with the requirements of due process.

5 May 8 Informal Grievance obtained as a result of a December 30, 1987 Freedom of Information Act request. (Exhibit J)

"The current system rewards carelessness but penalizes diligence. Obviously, a section that produces the quota of 40 decisions per week spends at least one hour of time for each case. A number of sections have found that proper processing of this amount cannot be done and have fallen behind the weekly quota. On the other hand, for example, a section that produces 80 cases per week spends on the average only one half an hour on each case. It is obvious that a one half hour review cannot be as complete as a one hour review. It is also apparent that the high producing section is rewarded for doing less work on each case. The record will show that on a number of occasions in the past certain sections have processed more than 80 cases in a single week. We dispute any contention that under these circumstances, each case was given a thoughtful and thorough review by each Board Member."

The pressures of production on staff attorneys are further exacerbated by the fact that staff attorneys apparently receive production credit for only one issue in a decision which may contain several distinguishable issues, each requiring time to properly evaluate and for which no production credit is given. For example, in a claim involving five issues the staff attorney only receives credit for the issue estimated to require the greatest amount of time to research and evaluate while the other four issues are assigned no production time value whatsoever. (Exhibit K)

An interesting corollary to the production credit limits in cases involving multiple issues is the effect additional credits in individual cases might have on overall BVA allowance rates. Over many years the BVA annually has approved about 13 percent of the appeals adjudicated. This

rate has remained so constant over the years that it has come to be termed "the quota" in some circles. If production credits were given for each issue decided in each case by the BVA, the allowance rates would be much lower than 13%

Indeed the VA's Veterans Appeals Control and Locator System (VACOLS) which provides statistical information on allowances and denials "is blind to the reasoning behind any individual decision. If, in a four issue appeal, three issues are denied and one issue is allowed, the VACOLS record will regard the BVA decision as an allowance".6

Moreover, if it is conservatively estimated that the typical appeal at the BVA contains three issues and if it is assumed that two of the three are disallowed, the annual allowance rate would decline two thirds from approximately 13 percent to 4.3 percent. Given the fact that it takes much less time to deny or remand a claim than it does to allow a claim, it is easy to understand why allowance rates in real terms, as measured by issues adjudicated rather than by claims folder, are so astonishingly low. Indeed, this may have been in the back of the mind of the BVA's chief legal advisor when he testified at the trial in the NARS case against the VA. In response to a question from Judge Patel, he stated "the quality of representation [before the Board of Veterans Appeals] should not make a difference as to whether there's an allowance or denial."

6 Covering letter accompanying documents secured from VA in response to a December 30, 1987 Freedom of Information Act request. (Exhibit L, pg. 2)

With this in mind, perhaps it will be less surprising for the committee to learn, as we have from at least one former BVA employee, that decisions of the Board are often developed by junior and senior staff attorneys after reviewing only the Regional Office Statement of the Case (SOC) denying the claim. Since these draft decisions are supposed to be based on a thorough review of all the evidence of record, when actual decisions are based only on a review of the Regional Office denial, veteran claimants are clearly being treated unfairly. The reason for the practice of drafting a tentative BVA decision from the SOC is the pressure created by a need to meet production goals in order to achieve promotions.

Inequitable Distribution of the Case Load

Another troubling factor resulting, we believe, from production quotas is that all too often junior attorneys work on complex multi-issue cases that should be worked on by more experienced senior attorneys. Rather than uniformly categorizing cases by levels of complexity and matching those cases with the experience levels of the attorneys, too often newer and less experienced attorneys will be working on cases that should be done by the more experienced attorneys. There are several reasons for this inequitable distribution of the case load. Senior attorneys who are hoping to become members of the Board are tempted to obtain easier cases that are euphemistically termed "blades" because of the thinness of the veterans claims folder. The claims folder contains the veteran's medical records and other evidence in support of his claim. Some of these folders can be a foot or more thick. By working on the thinner cases, a senior attorney is able to maintain a higher production rate than would otherwise be expected.

When too many of the senior attorneys are working on the easier cases, this results in newer, less experienced attorneys having to work on the more difficult cases that should have gone to the senior attorneys. Since junior attorneys must maintain 100 percent production in order to get promoted, they must work very rapidly on these complicated cases. This increases the risk of error as well as the likelihood that evidence will not be evaluated as carefully as it should be, if at all. Here again it must be remembered that Board members rely heavily on the work product of the staff attorneys who draft the BVA decisions.

Year-End Bonuses

Thus far we have attempted to show that veterans are disadvantaged at the VA's Supreme Court of claims adjudication because--in the absence of any system of precedent--different sections of the Boards decide similar and even identical cases differently, because decision-making is powered by production quotas in the absence of meaningful quality control and because junior attorneys are handling too many of the difficult cases. Adding further power to this production driven engine at the BVA were the availability of year end bonuses for high producers on the Board and for some attorneys.

During the October 6, 1987 hearing referenced earlier, the BVA Chairman acknowledged use of these bonuses as a management tool. In response to a question about how much in bonus money was received, the Chairman replied that the highest bonuses in 1986 were about $5,000 and the lowest about $500.[7] The Chairman claimed at the hearing and in subsequent responses to

7 October 6, 1987 hearing record of the House Veterans Affairs Subcommittee on Compensation, Pension and Insurance. Serial No. 100-32. pg 11. (Exhibit M)

written questions that quality was also measured in addition to productivity in determining who would receive bonus money. As pointed out earlier in this statement, however, which qualitative factors and how they are measured remains a mystery. In the absence of proof to the contrary, we must assume that productivity is the key.

As we have testified previously this year, the influence of year-end bonus-fueled production quotas has had the insidious effect of coloring the claims considerations of Board members. In describing this a recently retired Board member who testified at the February 18 hearing characterized the production quota and bonus system currently in place at the BVA as "evil".

In that witness' explanation of the effects of the current system, he calculated that some Board sections producing in excess of 100 cases per week were spending on average about eight minutes per case. Assuming that some sections have produced appellate decisions at or close to this rate in order to qualify for year-end bonuses, we strongly believe that thoroughness in claims decision-making has been and continues to be sacrificed improperly to the disadvantage of the veteran claimant. Why the BVA Chairman has turned a blind eye to this situation for so many years is unclear.

Moreover, the introduction of monetary rewards for production has not only created a market place inside the BVA for easily decided claims, it seems also to have created other distortions. Recently, the rate of claims remanded back to the originating Regional Office has jumped. Given the high pressure to meet established quotas and the incentives for year end bonuses

it is reasonable to assume the development of a "blade" shortage. For those unfortunate enough to face an exhausted supply of easily decided claims, the temptation to remand claims must loom large. Since production credits are given for remands and since it takes very little time to complete a remand, it seems likely that the recent increase in rates of remand is a byproduct of production quotas and bonus incentives.

In a Formal Grievance dated June 1, 1987 one Board member complained bitterly about the system of bonuses for production.8 This individual stated "[B]oard members in various sections are awarded monetary benefits or monetary benefits are withheld on the basis of the number of cases produced by the respective section as determined by the Chairman. I reject this system as inappropriate...and as inherently unfair."

The complaint goes on to say, "[F]or many years Administrative Law Judges (and their predecessor Hearing Examiners) have been exempted from the operation of efficiency rating system. The applicable law provides that they are entitled to prescribed pay 'independently of agency recommendations or ratings.' (See 5 U.S.C. 5372) The Civil Service Reform Act continued the exemption and there excluded Administrative Law Judges from the provisions of the Merit Pay System. The legislative history clearly shows the intent of Congress to insulate and protect the decisional independence of quasi-judicial officials. For the best interests of all concerned, it is more important that they be 'independent' than 'responsive.' It is empha-

8 Formal Grievance of June 1, 1987 obtained as a result of a December 30, 1987 Freedom of Information Act request. (Exhibit N, pg 2)

sized that the Board's decisions (with minor exceptions) are not subject to the scrutiny of the courts as are those of Administrative Law Judges (38 U.S.C. 211 (a), 4004 (a)). Therefore, the Board Members are entitled to the same or greater insulation, certainly not less. It is axiomatic that the power of financial reward or the witholding thereof carries with it an inherent capacity to exercise a very strong influence." (Exhibit N, pgs 3,4)

During the June 9 hearing, before the Senate Veterans Affairs Committee, in announcing the termination of the year end bonuses for high producing Board members and senior staff attorneys, BVA Chairman Kenneth Eaton stated as a reason that some of his critics misunderstood the importance of bonuses in spurring production. Chairman Eaton went on to say that he was considering alternatives to the bonuses.

If bonuses can be said to compromise quality, irrespective of the Chairman's apparent obsession with production, then any replacement he may come up with is likely to be just as inappropriate. Moreover, even in the absence of a replacement for the bonuses, production is still being used as a basis for determining promotion for staff attorneys and for elevating Board members to be Board section chiefs. Similarly, production is also apparently being used for purposes of demotion. Recently, Board Section Chief Ernest Wright was demoted to associate Board member, with the prior approval of the VA Administrator, for alleged quality and production deficiencies. Naturally, we suspect this demotion to have had something to do with his willingness to testify at the February 18 hearing before the

Government Operations Subcommittee, but quality and production were the reasons apparently given for the demotion.

In any event, the use of promotion and/or demotion as a spur to production is a questionable practice; perhaps not as completely unacceptable as the use of bonuses, but highly questionable nonetheless. At least one of the questions raised by this type of use of production goals is a question of legality.

In this connection, by Executive Branch Exemptions, Board members have been excluded from the Performance Appraisal System used to evaluate Federal employees and from the Merit Pay System, prescribed under chapter 54 of title 5, to avoid any appearance of the members being influenced by performance evaluations and merit pay.

Nevertheless, the BVA has operated an informal merit pay system and still is operating an informal performance appraisal system. The exemptions secured in 1982 and 1985, respectively, from the laws governing merit pay and performance appraisal were given to preserve the appearance of BVA independence from pay and performance in deciding appellate claims. Even if the conduct of informal merit pay and performance sytems within the BVA is legal, which is far from clear, the spirit of the exemptions is and has been ignored.

While the use of bonuses at the BVA is unsupportable on its face, the use of a production quota system must be examined very carefully as to its propriety at the BVA. As with the Executive exemption from the Merit Pay

System, the Executive exemption from the Performance Appraisal System was intended to preserve BVA independence. If not eliminated altogether, the use of production criteria for appraising Board members' performance must at least be modified to assure independence.

Apart from production as a measure of performance, quality of decision-making is also purported to be measured. The term "quality", as used by the Board Chairman is a bit misleading. It might be reassuring if quality measurements involved the substance of decisions rendered. Instead, quality is measured in terms of writing and format but not in terms of the judgment exercised by the panel member.

While it may be detrimental to independence to assess quality in terms of the final judgments rendered in appellate decisions at the BVA, it makes good sense to assess the reasoning and comprehensiveness of Board decisions. In our experience representing veterans before the BVA we often see final BVA decisions that inadequately state the denial of certain kinds of claims without adequate discussion of how the evidence of record, or lack thereof, supports the decision to deny a benefit. Similarly, decisions by the Board often fail to discuss all of the evidence at hand.

## Courtesy Signatures

Another byproduct of production pressure and bonus incentives is particularly troubling. This is the practice of some Board members in signing off on a claim decision without even reviewing the file. The danger for veterans is one of being denied due process as prescribed by the laws governing the way appeals are supposed to be adjudicated.

The May 11, 1987 Informal Grievance cited earlier in this statement (Exhibit J, pg 2) discusses courtesy sign-offs as follows; "Another, and perhaps the most serious manipulative method of exploiting the current system is by obtaining signatures on decisions by Board Members (or Acting Board Members) who sign the decisions despite not having reviewed the case. This so-called 'courtesy' system not only deprives claimants from a review to which they would otherwise be entitled, but is also used to artificially increase the production of decisions. We need not identify those sections that regularly engage in this practice because their identity is well known to the Deputy Vice Chairmen who review their decisions.

"With regard to the same system of 'courtesies', any section member can give an 'in house courtesy' signature, thereby accomplishing the same result as obtaining a 'courtesy' signature outside the section. All that is required are cooperative Board Members who are mainly motivated by monetary awards rather than concern for proper adjudication of claims.

"The undersigned are of the opinion that the pressures to meet goals or quotas (or even to increase allowance rates) are illegal."

We find it particularly troubling that the "courtesy" is frequently exercised by the physician member.

Board Section Inconsistencies

Although the BVA has an index of decisions, and Board members and staff attorneys are purportedly encouraged by the Chairman, through review of certain cases by the Deputy Vice-Chairmen, to make their current decisions

consistent with previous decisions, there is no requirement that a panel decide current cases in accordance with prior decisions. Accordingly, a different result can be reached, even in cases with substantially similar facts. Additionally, it has been suggested that some panels are more denial or allowance oriented than others and that the outcome of a claimant's case often depends on the assignment to a particular panel rather than the merits of the case.

We are aware of wide disparities in similar claims from BVA section to BVA section. Our suspicion that wide disparities in similar cases is supported by discussions we have had with retired Board members who refer to some sections as either allowance or denial prone. Moreover, the incentives to meet and exceed production goals at the BVA most probably have an effect on consistency. If a section, for example, is caught up on its production, it might be inclined to evaluate a similar claim more thoroughly than if it were behind on production goals.

The denial, allowance and remand rates for the BVA in fiscal year 1983, for example, show this variance in two "general medical" Board sections. Each of these sections, sections 6 and 11, adjudicate similar claims. In fiscal year 1983, Board section 6 denied only 60.4% of its cases while Board section 11 denied 83.8%. This is a percentage point differential of over 20%. The percentage differential on allowances between Board sections 6 and 11 was almost 10 percentage points, with section 6 allowing 20.5% of its cases and section 11 allowing only 10.8%. This variance has existed for years. (Exhibit O) Moreover, the outcome of a claim is often dependent on the panel to which it is assigned.

Medical Board Members

The BVA panel members and staff attorneys routinely informally consult with the physician panel members of the BVA to ascertain both general medical information and specific medical opinions regarding a particular case, generally without reflecting in the record of the decision that such a physician's opinion was considered in reaching the outcome. On occasion when the physician's opinion forms a major basis for the decision, the physician will sign the decision in place of one of the panel members.

This poses a serious question of propriety when a physician panel member either substitutes his opinion for the one offered by the physician(s) who examined the claimant or supplements the examining physician's conclusions with his or her own medical judgment.

The prospect of substituting the opinion of a physician panel member for that of the examining physician raises a serious question as to which physician's judgment ought to govern. In the actual practice of medicine, it has always been our understanding that the attending or examining physician's opinion was the one given the greatest weight. The BVA admittedly is not engaged in the practice of medicine, but one would think that the examining physician's opinion would outweigh the opinion of a physician sitting on a VA panel who had never even seen the veteran.

When a physician panelist's opinion is substituted for the opinion of the examining physician's opinion, a serious question of propriety is raised. However, when a physician panelist's opinion is used to deny a claim without any specific explanation for why the examining physician's

opinion was rejected, something is seriously wrong. Unfortunately, this occurs without the knowledge of the claimant's representative.

In this connection, when the record is supplemented by a BVA medical specialist outside the section with jurisdiction over the claim, the veteran and his claims representative should be advised. Due process would seem to require some notification of the supplementing of the record in advance of a final decision so as to allow a challenge. Currently no such advance notice is provided.

Board Section Decision-Making

Currently, Board Section decision-making must be unanimous. If there is a dissent, the Chairman can either cast his vote with the majority, thereby deciding the case, or can expand the panel by adding three members. The decision of who is appointed by the chairman to serve on the expanded panel is solely in the discretion of the chairman. This method of decision-making has been criticized on grounds that; by expanding the panel instead of voting with the majority, the chairman is disclosing his preference for the minority's vote, thereby tainting the independence of the expanded panel; that the doctrine of reasonable doubt should operate to allow a claim when the majority of a panel votes to allow it; and that the discretion to appoint the expanded panel creates a situation for potential, if not actual, abuse by the chairman in that he can "stack" the expanded panel with persons he knows to have a propensity for granting allowances or denials.



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Since the BVA Chairman currently has broad authority to vote when panels are divided, expand panels and channel claims to certain panels with known biases, this authority should be scaled back. The Chairman should, for example, be permitted to vote only, if at all, in cases where his vote is for an allowance. When panels are expanded, entirely new panelists should be assigned. Similarly, when a claim is up for reconsideration, the original denying panel should not be involved.

Moreover, the doctrine of reasonable doubt seems in need of some type of statutory definition. One way of doing this would require approval of a claim in cases where two of three panelists voted to allow and only one voted to deny a claim. Similarly, if the vote of a Board section is two to one against the veteran, the veteran ought to be entitled to an expanded panel. In cases where panels are expanded, the selection of panelists should be done by rotation. This would shield the BVA Chairman from charges of "stacking". When expanded panels are deadlocked with a three to three vote, reasonable doubt should be resolved in favor of the veteran by allowing the claim.

## Independent Medical Opinions

Independent medical opinions (IMOs) can be requested by either the veteran or by the BVA panel. If the veteran asks for an IMO, the BVA panel can deny the request. These opinions can be useful in developing a claim, but neither the veteran nor his representative has any way of knowing who will be selected to render an IMO from the VA's list. It would obviously be useful to know who is on the VA's list of independent medical experts, how

they are selected, their credentials and what their records have been in terms of appellate outcomes.

Typically, IMOs are granted upon the request of the veteran or his/her representative when the medical evidence of record is contradictory or when the medical question at issue is controversial. Under these circumstances, the IMO can have an important effect on the outcome of the BVA's decision. From the claimant's standpoint, this can be either good or bad.

At times the BVA section will request an IMO when no apparent contradictory evidence of record exists. The BVA request for an IMO cannot be challenged by the veteran. The BVA should be constrained from using IMOs when the evidence of record is non-contradictory. Short of this change, serious consideration should be given to allowing for challenges to BVA requests for IMOs.

In a related matter, when requests for an IMO have been made by the veteran, the request is usually denied. However, these cases are often remanded for further development. When requests for an IMO are denied the BVA panel gives an explanation for its decision, but these explanations are often lacking in detail.

The current regulations governing the request and use of independent medical opinions are basically adequate. The problem lies in the unwillingness of the BVA Board sections to invoke the IMO regulations, either on their own initiative or at the request of the service representative. Use of an IMO results in a delay of the case as it is referred out of the BVA to

the IMO. A BVA Board section concerned about quotas and processing high numbers of claims appeals quickly will not want to invoke the IMO regulations.

We believe that allowing a veteran to be heard if a request for an IMO is denied is a good idea. Any procedure which adds to the due process rights of the veteran is laudable. But, why stop here?

Similarly, if a pre-final-decision hearing or argument on the issue of whether an IMO will be requested is provided for, why not allow a pre-final-decision hearing or argument on all issues on appeal. That is, the BVA should issue a "preliminary decision", which would allow the veteran to know on which evidence and legal grounds the BVA is relying to decide that appeal, before a "final" decision is issued and it is too late.

Currently, the veteran does not know the BVA's rationale for the decision until the decision itself is issued. (This can be challenged through a request for reconsideration, but the standard is extremely difficult to meet, and a veteran rarely wins in the end.) A preliminary decision, or the BVA's version of the Statement of the Case used at the Regional Office level, would truly protect the due process rights and best interests of the veteran. Such a document in the appeals procedure would allow the veteran to focus on that part of the claim which is critical, and provide the necessary evidence or legal theory to overcome the BVA rationale. A fairer outcome would result because the veteran would have no one else to blame for the result — the evidentiary or legal hurdle has been overcome, or it has not.

Travel Boards

At the BVA oversight hearing held by the Senate Veterans Affairs Committee on June 9, 1988, the BVA Chairman was asked several questions concerning the traveling Boards and why their allowance rates were so much higher than the Board sections here in Washington, D.C. The BVA Chairman's responses were startling. In connection with a question, for example, on how it is determined which and how many claims would be heard by the traveling Board, the Chairman responded by saying that the traveling Boards can hear only so many claims and that the decision as to which claims will be heard is made by parcelling out numbers to the various veterans' service organizations. Chairman Cranston asked if this was done by use of some sort of quota system and the Chairman replied in the affirmative.

What is implied by this is that the traveling Boards are specifically designed to reward the veterans' service organizations by allowing them to present claims before the traveling Boards which allow claims much more frequently than would be the case if they were heard in Washington, D.C. We believe it is appropriate for this committee to ask the BVA Chairman what is intended by this practice, what are the specific allotments of cases to be heard by the traveling Boards to which veterans' organizations and whether veterans unrepresented by any veterans' organization ever have their cases heard by the traveling Boards.

Another troubling aspect of the circumstances surrounding the travel Boards is the question of how veterans might learn of and opt for a hearing before a travel Board even if represented by a veterans' service organization. When a claim is rejected by a Regional Office and the veteran decides

to appeal, the form used is VA Form 1-9 (Exhibit P). This form is known as the "substantive appeal". On it there is box 9B in which it can be indicated that a desire for a personal hearing is sought. Only two choices are offered. The first of these is a personal hearing before a three member panel of Regional Office employees, who send the transcript of the hearing to the BVA for review. The second is a request for a personal hearing before the BVA in Washington, D.C. Nowhere is there an available option for a personal hearing before a travel Board. Such requests are made internally by veterans service organizations that are "in the know." Interestingly enough, the elections available need not be made by the veteran if his service organization representative completes the form. It may be obvious to the service representative that travel Boards are available from time to time, but it certainly is not obvious to the veteran.

All of this is significant for a variety of reasons. The statistics are fairly dramatic in demonstrating that claims are allowed far more frequently when the veteran exercises his or her option for a face-to-face personal hearing. Not only that, but face-to-face personal hearings before a travel Board are far more likely to result in an allowance than personal hearings before the BVA in Washington, D.C.

When the Regional Office hearing option is selected, the face-to-face personal hearing before claims decisionmakers is forfeited since the Regional Office panel, in forwarding a transcript, cannot possibly forward the impressions of honesty or sincerity or inflections conveyed by the veteran in a face-to-face meeting to the actual decisionmakers at the BVA. Hence, the availability of two hearing options on the form is really only one hear-

ing option. If an actual personal hearing is sought, the only real option on the form is a hearing in Washington, D.C. Why no travel Board option appears on the form is unclear.

How veterans organization representatives determine which of the two options on the form is the more suitable for the veteran when he or she allows these representatives to handle their claim is an open question. More importantly, we would like to know how the veterans organization service representatives determine which of their claimants will be heard by a travel Board, which will not and how these decisions are made.

## Covert Advisory Opinions

As the attached January 8, 1986 memorandum from the Deputy Vice Chairmen of the BVA indicates, legal advisors to Board panels are encouraged to seek the input of physician-members from other panels who have some alleged expertise in the medical area in question on some claims. (Exhibit Q) No provision is made to notify the veteran or his counsel that the record is essentially being supplemented. No opportunity is given for rebuttal. This is a questionable practice and would likely be prohibited at agencies subject to the Administrative Procedures Act.

## The BVA is not Independent

The potential role of the VA's General Counsel in BVA decision-making reinforces the need for judicial review. Each year the VA's General Counsel issues dozens of legal opinions which, according to 38 U.S.C. 4004 (c), binds the BVA in its decision-making. The VA's General Counsel is appointed by the VA Administrator and serves at his will. The VA Administrator is

appointed by the President. Plainly the VA General Counsel's view of the issues addressed in his binding legal opinions is colored by the fact that he or she serves the VA Administrator. Also, how the VA General Counsel interprets a particular statute often has an impact on the VA's budget. In the context of current budget restraints, this particular problem will continue. With this in mind it is appropriate to note that it is a well known fact that the Office of Management and Budget has dominated the VA's policy decision-making for many years.

A federal judge who is truly independent and whose job is not affected by how he or she decides an issue is likely to view the legal issue presented from a different perspective than does the VA. This is, in fact, a federal judge's role in our Constitutional system of checks and balances.

## Conclusion

Perhaps the best summary of the current circumstances at the BVA comes from a former member of the Board who retired early because of these circumstances. In a July 19, 1987 letter written to the principal attorney for the National Association of Radiation Survivors (NARS) in a lawsuit against the VA, the retiree stated his reasons for leaving as, "my reasons were frustration over being repeatedly denied the opportunity of becoming Chief Member (each section of the Board has three board members, one of whom is the Chief Member) for what I suspect were my own pro-veteran, pro-POW, pro-appellant views; and the fact that being a Board Member did not satisfy my essential needs for meaningful, enjoyable work due to the factory-like

environment imposed on the BVA by its Chairman and Vice Chairman".9

The writer goes on to say "[a]ll promotions, bonuses and other rewards are based almost exclusively on productivity, with only lip service being paid to quality. Sections are in competition with each other for a yearly bonus, which is paid to the sections with the highest productivity over the year, with the largest share going to the Chief Member. This encourages the Chief Member of each section to focus on getting the cases out, so to speak, regardless of quality or whether a fair result is reached in the case or not. (The Chief Member of the section I was in at the time of my retirement, although a decent person overall, did not view favorably my dissents in favor of the veteran or other claimant, which he felt slowed down the productivity of the section and impaired his chances for the yearly bonus...) It is my belief, based on my 20 years' experience with the BVA, that the agency is not discharging its duties and responsibilities toward the veterans of this nation and their survivors, in the spirit which Congress intended and that judicial review of BVA decisions, and lifting of the $10 limitation on attorneys' fees, would greatly benefit veterans and other claimants for Veterans Administration benefits. In my judgment, the Vice Chairman and most board members, whether law members or medical members, have an anti-claimant orientation, and little sympathy for the veterans' benefits program, which they view as a huge give-away. This view colors the

9 July 19, 1987 letter to Gordon Erspamer from retired Board member. The individual's name has been deleted because we suspect his employment prospects may be clouded by VA reprisals if the agency is contacted as an employment reference. (Exhibit P)

decisions they reach on the cases before them. (Soon after I became a board member, I was called in by the Vice-Chairman, as a result of a dispute I was having with the Deputy Vice Chairman, in charge of one-half of the board to which my section was assigned, and was told by the Vice Chairman that I was too allowance-prone, and that it was preferable to deny a case, when in doubt, than to allow it, as a denial always had a chance of being reversed later, whereas an allowance was final.)... Most board members, in my judgment, pay only lip service to the laws and regulations, disregarding those with which they are not in sympathy in order to reach the result they favor in the particular case... Some of the most anti-veteran, pro-denial Chief Members, with the lowest allowance statistics year after year, end up getting the largest bonus year after year, based on their production statistics."

STATEMENT OF

NOEL C. WOOSLEY

AMVETS NATIONAL SERVICE DIRECTOR

Before The

COMMITTEE ON VETERANS' AFFAIRS

U.S. HOUSE OF REPRESENTATIVES

On

The Operation of the Board of Veterans Appeals

9:00 a.m., August 11, 1988

Room 334, Cannon House Office Building

Mr. Chairman, members of the Committee, AMVETS is pleased to present our view on the operation of the Board of Veterans Appeals (BVA).

The Board of Veterans Appeals appropriate response time to an appeal is 130 days. It is our understanding that the Board was able to achieve this response time by the authorized expansion of the Board to 21 sections. AMVETS is satisfied with this response time. Our primary concern lies with the total length of time of the appellate process, which now averages 14 months.

There is a growing misconception, by many veterans, that BVA and the agency as a whole have hidden agendas to deny worthy veterans their benefit entitlements. This perception has not yet permeated throughout the veterans community. However, a small minority of the veteran population, it would appear, will not rest until everyone believes as they believe (or claim to believe), that the operation of the veterans benefit delivery system is less than honest. We do not share that opinion. Our concerns lie with the effect productivity standards have on judgmental quality, due to the "industralization" of the decision making process. We feel that deliberation time is restrictive, adversely affecting prioritizing of simple cases, delaying disposition of the more complex type cases, and the quality of decisions.

We are cognizant of the fact that the development of a claim may at times become a complex process wherein the Veterans Administration must rely on hopefully timely response to requests for records from the service departments, the Social Security Administration, the Public Health Service, the private medical sector, and a variety of other sources which are not under the Veterans Administration's control.

The Veterans Administration has acknowledged that government agencies do not always provide timely responses to inquiries, thereby delaying the claims process, and that little can be done to rectify this situation. We are hopeful that a more cooperative effort can be established between the government agencies involved in order to complete the claims process in a more expeditious fashion.

We do not believe that the Department of Veterans Benefits (DVB) has experienced a significant reduction in the amount of submissions of beneficiary claims. We therefore are concerned with staffing levels, and the use of production standards by DVB at the agencies of original jurisdiction, where the appellate process starts. It seems that attrition has had an adverse affect on the adjudication divisions of the Regional Offices. Rating Boards have been abolished and medical members in some instances may be required to simultaneously serve two rating boards. There is a resultant

increase in caseload assignments. Productivity is goal oriented causing hasty review and sign-off on decisions without adequate individual review of pertinent evidence. Dissenting opinions are a scarcity, and there is present an expressed reliance on the Board of Veterans Appeals to resolve obvious reasonable doubt, or to request by remand needed development.

It is our belief that the current rate of remanding cases back to agencies of original jurisdiction is directly correlated to the use of production standards and reductions in decision making personnel at VA Regional Offices.

Attrition has also affected the productivity of administrative services throughout the system. Timeliness of claims processing suffers due to delays in transcription of documents, backlogs in filing evidence and delivery of files to appropriate divisions, particularly when a regional office requires authorizing personnel to rotate duties between file activities and adjudication.

It is our firm belief that continued reductions in the FTEE of the DVB will not enhance the claims/appeal process, or timeliness of that process. Without adequate funding for personnel requirements we can only expect deterioration of both processes, and the veterans' faith in the benefits delivery system.

Our final comments pertain to the physical operation of the Board of Veterans Appeals (BVA). Public Law 98-223 authorized an increase in board members from 50 to 65 to establish 21 appellate sections. Those 21 sections are divided; 14 sections are stationed in the Lafayette Building, and 7 sections, along with 3 veterans service organizations will be annexed, as a mini-board, in the Riggs Building. This outstationing of sections was necessitated by the obvious lack of space availability at the Lafayette Building. To accommodate the establishment of this mini-board. The board established hearing/conference, mail and control rooms, and a research center at the Riggs location. Presumably, at least 30% of the Board's work will be accomplished by those 7 sections, and we are concerned with the logistics of this breakdown of the Board of Veterans Appeals. Special coordinating efforts must now be established to ensure proper maintenance and distribution of claims and hearings. We feel that the overall efficiency of the Board will suffer due to this separation.

We respectfully decline comment on the allegations of impropriety. AMVETS has been unable to factually substantiate those alleged practices and therefore offers no comment.

Office of the
Administrator
of Veterans Affairs

Washington DC 20420

Veterans
Administration

OCT 1 1988

In Reply Refer To:

Honorable G. V. (Sonny) Montgomery
Chairman, Committee on Veterans'
Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find the Agency's responses to questions which you forwarded on behalf of Congressman Evans for the August 11, 1988, hearing on the Board of Veterans' Appeals. Thank you for the opportunity to provide this additional information for the record.

Sincerely,

THOMAS K. TURNAGE
Administrator

Enclosure

cc: Honorable Lane Evans

# WRITTEN COMMITTEE QUESTIONS AND THEIR RESPONSE

Questions Following August 11, 1988 Hearing
Subcommittee on Compensation Pension and Insurance
Committee on Veterans' Affairs
United States House of Representatives
Honorable Lane Evans

*1. During your testimony you stated that the bonus system has been discontinued because it technically violated OPM guidelines. Please identify and append a copy of the OPM guidelines which were violated and any relevant interpretations of these guidelines and describe how the bonus system you used violated these guidelines. Also, please identify who determined the bonus system was contrary to OPM guidelines and provide a copy of any written determinations to this effect.*

In my testimony, I did not intend to suggest that the Board of Veterans Appeals had violated any guidelines with respect to eligibility for performance awards. To the best of my knowledge, BVA performance awards have always been given in accordance with applicable OPM regulations and in coordination with the VA Office of Personnel and Labor Relations. On May 25, 1988, the Director of the VA Office of Personnel and Labor Relations issued a memorandum to the Agency's Chief of Staff which concluded that any performance award must be based on a rating of record under a performance appraisal system approved by the Office of Personnel Management (OPM). Because the Board Members were exempt from performance appraisal requirements, they were not covered by a recognized performance appraisal system and thus were not eligible for performance-based awards. See copy of the May 25, 1988, memorandum, Attachment 1.1.

The revised regulations requiring a performance rating under the performance appraisal system became effective on April 10 1986, after the 1986-1987 appraisal period for BVA performance awards had begun. These changes were implemented by the Agency with a change to the personnel manual in December 1986. Therefore, performance awards were given for that appraisal period, since the change in regulations had occurred during that period, and also because BVA personnel had received no notice at the beginning of the period that there would be no eligibility for performance awards. Since that time it has not been possible to provide performance awards on this basis. In the Spring of 1987, the Chairman discussed this matter with his Chief Members at their weekly meeting and told them that a question had been raised as to Board members' eligibility for performance awards but that he was hopeful that the issue could be resolved favorably. See copy of 5 C.F.R. Subpart E, sections 430.501 to 430.506, Attachment 1.2. Prior to these regulations, performance award requirements for non-PMRS (Performance Management and Recognition System) employees were separate from the performance appraisal program. In other words, the regulations did not preclude the grant of a performance award to an individual not covered by a performance appraisal program. However, performance awards are now tied to a performance appraisal system and may not be given without such a program in place. In order to preserve their judicial independence, there is no performance appraisal for Board Members.

*2. During your testimony before the Senate Veterans Affairs Committee on June 9, 1988, you stated that you will be exploring other possible ways of rewarding timely decisions. What other ways have you explored thus far?*

Since the issuance of the memorandum from the Director of the Office of Personnel and Labor Relations, no other ways have been explored which would permit awards to Board Members.

*3. During your testimony before this Committee you stated that the August 11, 1986 memorandum to you from BVA Member Phil Wright refers to sections other than Mr. Wright's when it says "it is fairly well known that at least 3 and possibly 5 or more sections and now operating . . . with at most two actual reviews." You also indicated you know which sections Mr. Wright was referring to and took some action as a result of the memorandum. Please identify the sections Mr. Wright was referring to, and*

the names of the members of those sections. Also, please describe the actions you took as a result of the memorandum and, if any of the actions you took are memoralized in writing, please attach copies of these documents to your response.

The essence of the memorandum from Phil Wright referred to the problems Sections were encountering in signing decisions because of the lack of a full complement of Board Members. In order to answer this question, I must provide some background. Since the time of the BVA's founding and until the early 1980's, it was a practice at the Board to use Senior Attorneys and Physicians who were not Board Members to review and sign Board decisions. They conducted the same review as the Board Members and signed as an "Acting Board Member." This greatly facilitated the decision process, especially at times when Board Members were absent because of illness, annual leave or Travel Board requirements. There were also individuals who were recommended for Board appointment but who were not appointed for several months. A question was raised as to the legality of the procedure utilizing Acting Board Members. Ultimately, legislation was passed which formalized the process and permitted the designation of Acting Board Members, but only for a period of 270 days during a 12-month period. See Public Law 98-223, section 208, effective March 2, 1984, amending 38 U.S.C. 4002. The initial effect of this limitation on the length of time an Acting Board Member could serve in that capacity was a decrease in the number of individuals available to sign decisions. For example, there were physicians assigned to Sections who were reviewing cases, but who were unable to sign decisions. Moreover, a decision in a strictly legal case is usually signed by three attorneys, and in a Section composed of two legal Members and one medical Member, a third legal signature had to be obtained from a Member of another Section. While a decision may have been thoroughly reviewed by an experienced Senior Attorney in the Section, that attorney could not sign unless designated an Acting Board Member. Thus, once the Board Sections were unable to use personnel in their own Sections to act as Acting Board Members when needed, it was necessary for Sections to obtain signatures outside of the Section. Only one Acting Board Member may participate on a three-member panel. In the initial period after the legislation was passed, the number of individuals designated as Acting Board Members fluctuated from quarter to quarter. This continued to place pressure on the Board Sections who needed three signatures for a decision. See copy of the August 11, 1986, memorandum, Attachment 3.1.

After I received the memorandum in question from Mr. Wright, I met with the Deputy Vice Chairmen and discussed the matter. We agreed that one of the problems was the lack of a sufficient number of Acting Board Members. In implementing the new Acting Board Member legislation, our practice had been to attempt to use as few individuals on an "acting" basis as possible. Following this meeting, we expanded the list of Acting Board Members from 12 to 17 and then to 24. See Attachment 3.2 showing Chairman's Numbered Memoranda designating Acting Board Members in March 1986, September 1986 and in December 1986, respectively. In addition, the Deputy Vice Chairmen had been conducting in-depth quality reviews of from 15% to 20% of BVA decisions. During this period of review, a finding of error relating to the disposition of a case was extremely rare, and certainly no more frequent than had previously been the case.

My response to that memorandum was to increase the number of Acting Board Members and to alert the Deputy Vice Chairmen to continue to monitor closely the decisions of the BVA. I believe that response was proper and it appears that these measures were effective. I prefer to refrain from interfering with the procedures set down by a Chief Member within his or her Section, particularly as they relate to the decision-making process, and provided, of course, that there is no indication that the practices of a Section are adverse to the interests of the veteran.

At the time of the hearing on August 11 of this year, I thought that the memorandum referred to Sections which, at times, have experienced a backlog of decisions due to word processing difficulties and a change in secretarial support. Once the Board Members of a Section have reviewed and signed a decision, there are clerical processing steps to be taken before the cases leave the Section and are dispatched. Because of a shortage in clerical

personnel available to perform this processing in a timely manner, decisions which have actually been reviewed and signed may be held in a Section awaiting dispatch. Once clerical help becomes available, a large number of these signed decisions will be processed all at once. Statistics on the number of decisions dispatched by individual Sections are circulated among the Board Members on a weekly basis and because there may be several weeks during which a great many backlogged decisions are dispatched, rumors develop from time to time that these decisions were being reviewed and signed very quickly. However, the statistics on cases dispatched from such a Section represent a backlog of several months work. In fact we experienced isolated situations such as this with several Sections during 1986 and early 1987 as word processing equipment was being installed in each of the Sections.

When Mr. Wright submitted his memorandum to me, I did not conduct an investigation into the identity of the particular Sections, but proceeded with the referral to the Deputy Vice Chairmen and subsequent increase in the number of Acting Board Members. Additionally, in their review of cases during the months both preceding and subsequent to Mr. Wright's memorandum, the Deputy Vice Chairmen found no indications of improper reviews. Therefore, no particular individual or Section was identified or counseled.

4. *Please describe the process by which promotions and in-grade salary increases for BVA Board members are decided and indicate the degree to which productivity is a factor in these decisions.*

All Section Board Member positions are at the GS-15 level and there is no eligibility for a promotion. In-grade salary increases are based on performance at an acceptable level of competence, and no Board Member has ever been denied an in-grade increase because of problems with production.

5. *Please provide the Committee with any studies or analyses that have been done of the relationship between the productivity of BVA Sections and the allowance rate, as well as any studies or analyses of the relationship between productivity and quality of decision-making.*

The BVA routinely produces an internal report entitled "Board of Veterans Appeals Dispositions by Sections." This report contains information showing both the number of decisions produced and the allowance, denial and remand rates of all BVA Board Sections. Distribution of this report is regularly made to all BVA Board Sections and management staff on a quarterly and evaluation year basis. Attachments 5.1 through 5.5 are copies of each edition of this report that have been reproduced and distributed over the past 1-year period.

Also included in Attachment 5.6 is a copy of a white paper provided to the Administrator of Veterans Affairs in late October 1987. The subject of this white paper was the BVA's views regarding the impact of productivity upon quality at the Board. Included in this paper were the results of some then recent analyses in which quantitative measures of productivity and quality at the staff attorney and overall BVA levels were contrasted in order to determine whether periods of high productivity appeared to correlate with periods of low quality. No such correlation was found to exist as a result of this examination.

INDEX OF ATTACHMENTS
QUESTIONS FOLLOWING AUGUST 11, 1988 HEARIING

Performance Awards for Board of Veterans Appeals Board Members . . . . . Attachment 1.1

Office of Personnel Management, Performance Management System, Final Rule, 5 C.F.R. Parts 293, 300, 335, 430, 431, 451, 531, 532, and 771 . . . . . Attachment 1.2

Memorandum from Phil Wright . . . . . Attachment 3.1

Acting Board Members, Numbered Memorandum 01-86-25. . . Attachment 3.2

Acting Board Members, Numbered Memorandum 01-86-36. . . Attachment 3.2

Acting Board Members, Numbered Memorandum 01-86-38. . . Attachment 3.2

Board of Veterans Appeals--Dispositions by Sections Quarter ending December 31, 1987. . . . . Attachment 5.1

Board of Veterans Appeals--Dispositions by Sections FY 1987 . . . . . Attachment 5.2

Board of Veterans Appeals--Dispositions by Sections Quarter ending March 31, 1988 . . . . . Attachment 5.3

Board of Veterans Appeals--Dispositions by Sections Quarter ending March 31, 1988 (Revised) . . . . . Attachment 5.4

Board of Veterans Appeals--Dispositions by Sections Quarter ending June 30, 1988. . . . . Attachment 5.5

White Paper--Impact of Productivity Upon Quality . . . . . Attachment 5.6

Attachment 1.1

Veterans Administration

# Memorandum

Date: May 25, 1988

From: Director, Office of Personnel and Labor Relations (05)

Subj: Performance Awards for Board of Veterans Appeals Board Members

To: Chief of Staff (00B)
Thru: Assistant Chief of Staff (00B1)

1. This memorandum will provide you with our views on the eligibility of Board members of the Board of Veterans Appeals (BVA) for performance awards to assist you in future deliberations on this subject.

2. Prior to the issuance of final regulations on the performance appraisal system for non-PMRS employees by the Office of Personnel Management (OPM), in March 1986, our interpretation of the existing regulations indicated some flexibility in determining the scope of performance awards as it applied to Board members of the BVA. However, once the new regulations were issued and we worked with the OPM in developing the VA policy, they confirmed that the regulations clearly establish that any award for performance must be based on a rating of record under a performance appraisal system approved by the OPM.

3. All members of the Board, including Chief, Legal and Medical members, are excluded from the Performance Management and Recognition System (PMRS) (5 U.S.C., Ch. 54) as well as the performance appraisal system requirements (5 U.S.C., Ch. 43). Since the BVA Board members are exempt from performance appraisal requirements, they are not covered by a recognized performance appraisal system and are not eligible for performance based awards. The appraisal system utilized by the BVA to measure and evaluate the productivity and quality of decisions of the Board sections does not meet the criteria of a performance system under 5 U.S.C, Ch. 43.

4. The new regulations, as they pertained to performance awards, were implemented for the appraisal period that ended on March 31, 1987. At that time, this issue was discussed with the Chairman, BVA, and members of his staff. Due to the timing and the lateness of the clarification of the regulations by the OPM, it was decided to process the 1987 performance awards that the Chairman had proposed for eight Board members. However, it was our understanding that all concerned parties recognized that any future awards could not be considered or processed as performance awards, and that some alternatives would need to be explored.

5. One possible alternative to a performance award that was discussed at that time, was a cash award based on superior accomplishment. However, while a superior accomplishment award does provide a means of recognizing a contribution of a Board member that results in tangible or intangible savings to the government, we had some reservations about the applicability of the criteria for these awards to the work situation at the BVA. Specifically, superior accomplishment awards were not designed to reward sustained performance over

a given appraisal period. Rather, they are intended to reward special acts or accomplishments. In addition, the BVA expressed concern that the amount of an award granted through this means would be considerably less than the amount of the performance awards previously granted. Consequently, this option was not fully explored.

6. In summary, the exclusion from performance requirements precludes members of the Board from being eligible to receive performance based awards. This has been recently verified by the OPM. In addition, this determination is consistent with the manner in which the hearing officers of the Social Security Administration, who, as Administrative Law Judges, are also excluded from performance requirements, are treated. They are ineligible for, and do not receive any awards based on performance. The same is true for the Administrative Law Judges at the Merit Systems Protection Board.

7. I am available to discuss this matter with you, at your convenience. My staff is also available to assist the BVA in exploring and developing options to recognize outstanding contributions of their Board members.

MICHAEL RUDD

cc: 01

Attachment 1.2

Federal Register

Tuesday
March 11, 1986

Part II

# Office of Personnel Management

5 CFR Parts 293, 300, 335, 430, 431, 451, 531, 532, and 771

Performance Management System; Final Rule

5 CFR Parts 293 and 430

Performance Management System; Proposed Rule

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 293, 300, 335, 430, 431, 451, 531, 532, and 771

Performance Management System

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations on the Performance Management System (PMS). In response to agency requests, the regulations have been updated to make them more consistent with the final regulations recently published for the Performance Management and Recognition System (PMRS), mandated by title II of the Civil Service Retirement Spouse Equity Act of 1984, effective October 1, 1984. Additionally, the regulations modify and streamline the incentive awards program.

Proposed regulations related to some of the provisions of the PMS are being published elsewhere in today's Federal Register. The subjects of the proposed regulations are filing and transfer of performance records, establishment of Performance Appraisal Advisory Committees, and funding and payment of performance awards.

DATES: *Effective Date:* April 10, 1986.

*Due Date:* Performance Management Plans must be submitted to the Office of Personnel Management for review and approval no later than June 9, 1986.

*Approval Date:* Generally, OPM will review and approve each Performance Management Plan within 90 days after it is received in OPM.

*Implementation Dates:* Subpart A of Part 430 becomes effective 30 days from the date of publication of these regulations. Each agency's Performance Management Plan and all parts of the regulations become effective no later than 90 days from the date of OPM approval of the Plan. Performance appraisal provisions of the Plan become applicable to each employee at the beginning of the employee's next performance appraisal cycle. (See Issue 62 for clarification of dates for Plan implementation.)

ADDRESS: Send or deliver agency Performance Management Plans to John W. Fossum, Assistant Director for Performance Management, Workforce Effectiveness and Development Group, Office of Personnel Management, 1900 E Street NW., Room 7520, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Allen B. Levan, (202) 632-5653.

SUPPLEMENTARY INFORMATION: On August 30, 1985, at 50 FR 35505-35506 and 50 FR 35513-35530, OPM issued proposed regulations on the Performance Management System. Those regulations were essentially the same as final rules that were published on October 25, 1983 (48 FR 49472), but did not go into effect until July 3, 1985. The only changes proposed on August 30, 1985, were:

1. A revised schedule for implementing the Performance Management System, reflecting the delay in the effectiveness of the regulations;

2. Removal of the portions dealing with the Merit Pay System that were superseded by the law and regulations implementing the PMRS; and

3. Editorial changes to conform to the PMRS regulations.

The proposed rules were published for a 30-day comment period, which ended September 30, 1985. During that comment period, OPM received comments from 29 agencies, four labor organizations, two members of Congress, one professional association, and one individual commenter. Most of the comments were very detailed, with constructive suggestions for improving the regulations. OPM has carefully reviewed and analyzed the comments, and these final regulations incorporate many of the commenters' suggestions.

Some changes requested by commenters were substantially different from the proposed regulations. OPM agrees that further changes are needed in the PMS, and is proposing changes elsewhere in today's daily issue in the areas of recordkeeping, performance awards, and administration of performance appraisal systems.

## Overview of Changes

The overwhelming majority of the commenters suggested, either generally or on specific provisions, that OPM revise the regulations to make them as consistent as possible with PMRS regulations. (Final PMRS regulations were published August 30, 1985, at 50 FR 35488).

OPM agrees that wherever possible the performance appraisal and award systems for employees under the General Schedule (GS), Prevailing Rate System, Senior Executive Service (SES), and PMRS should be as consistent as possible. Congressional intent for performance management has most recently and clearly been demonstrated in the history of the legislation creating the PMRS. Consistency among the systems will foster ease of administration, reduce confusion, and clearly support pay for performance under the performance management umbrella, while at the same time achieving equity among the different systems covering all employees. OPM believes that consistency and equity among these systems can be achieved while meeting all statutory requirements provided for the different groups of employees.

Therefore, except for the proposed regulations noted above, the regulations have been revised to provide as much consistency as possible in appraising and rewarding performance for all employees. Specific changes are outlined in the analyses of comments and changes to the final regulations.

## Format Changes

The format of the regulations has been reorganized in several areas, for the ease of the user and to support the concept of pay for performance. Part 430, Performance Management, now contains performance appraisal regulations for all categories of Federal employees, along with performance award regulations for GS and Prevailing Rate employees.

With the placement of SES performance appraisal regulations in Part 430, OPM has removed Part 431 from Title 5, Code of Federal Regulations. With the placement of performance awards provisions in Part 430, the heading for Part 531 reverts to the heading under previous regulations: "Pay Under the General Schedule", and Subpart H in Part 532, covering performance awards for Prevailing Rate employees, is no longer necessary and has been removed.

Incentive Awards regulations, Part 451, are reorganized by separating Presidential Awards from all other incentive awards, now designated as superior accomplishment awards. Productivity Gainsharing regulations, currently under development, will be placed under Part 451, in Subpart C.

## Specific Changes

Following is a detailed outline of the changes to the regulations, identifying each issue, a summary of comments, and a discussion of OPM rationale for the changes. The issues are listed in sequential order as they appeared in the proposed regulations, with each "Change" paragraph indicating the new location of the final regulation on the issue.

1. *Issue:* Filing and Transfer of Performance Records (Part 293, Subpart D).

*Summary of Comments:* Fifteen agencies and one professional organization commented on the proposed regulations requiring the filing and transfer of performance records with employees' Official Personnel Folders (OPF's). Twelve of the agencies suggest that performance records filing systems be the same for all employees as they currently are for PMRS employees; i.e., that agencies be given the option to file performance records for all employees in either the OPF or the Employee Performance File (EPF) system. If only one system must be used, four agencies prefer to use the EPF, while three agencies prefer to use the OPF. Two agencies object to filing duplicate records.

One professional organization objects to the mandatory transfer of performance records, and two agencies prefer not to transfer performance plans (elements and standards) for each of the three ratings of record to be transferred in the OPF. One of those agencies requests that OPM change the section in the EPF subpart on retention of ratings of record, to require agencies to retain performance plans for only one year, rather than three.

One agency requests clarification of the term "additional performance-related documents" found in the EPF subpart, and two agencies request clarification of the terms "rating" and "rating of record" as they are used in Part 293. One agency requests guidance on implementing the changes in Part 293.

*Discussion:* OPM agrees that agencies should have the option of filing performance ratings of record and the performance plans on which they are based, in either the OPF or the EPF, provided that the ratings of record for 3 years and the performance plan on which the most recent rating was based are transferred in the OPF when the employee leaves his/her position. Reference to additional performance-related documents may be found in §§ 293.402(b)(1) and 293.403(b), Contents of Employee Performance Files. In response to the suggestion that agencies retain performance plans for only 1 year, the EPF regulations are not changed. They continue to require retention of performance plans for 3 years, because there are other personnel-related purposes for agency use of these performance-related documents. Agencies may file these performance plans in either the OPF or the EPF, as long as they transfer the plan on which the most recent rating was based in the OPF of a transferring employee. To clarify "rating" and "rating of record", agencies may refer to Part 430, Performance Management, in which these definitions have been revised and clarified.

OPM will provide further FPM guidance on filing and transferring performance records. However, beginning on the effective date of these regulations, agencies are required to transfer performance ratings in the OPF's of all employees who are leaving their positions.

*Changes:* Agencies have the option of filing performance ratings of record and the performance plans on which they are based in either the OPF or the EPF, provided that, whenever an employee changes positions, the agency transfers in the employee's OPF the three ratings of record and the performance plan on which the most recent rating was based. (See also Issue 1 of proposed PMS regulations published elsewhere in today's daily issue.)

2. *Issue:* Time-in-Grade Restrictions (§ 300.602).

*Summary of Comments:* One agency agrees with the proposed time-in-grade restrictions. One labor organization thinks that § 300.602 should be deleted and adjusted to show that employees can be promoted at any time to a higher grade when they demonstrate that they can perform the work.

*Discussion:* The 1 year time-in-grade requirement for promotion to positions at GS–6 or above is consistent with the performance requirements for career ladder promotions and the (usually) annual rating cycle for employees. Employees who are considered for career ladder promotions to positions at GS–5 or below must also receive a performance rating to be used as a basis for determining whether they are eligible for a career ladder promotion.

*Change:* No change.

3. *Issue:* Eligibility for Career-Ladder Promotion (§ 335.104).

*Summary of Comments.* Two agencies object to priority consideration for career ladder promotions to employees with the highest performance ratings. Reasons given are: the creation of an additional selection procedure, the creation of an additional administrative burden, and logistical problems that would result unless agencies have discretion as to the organizational and geographic areas of consideration to be used. One agency thinks that the section should be amended to permit an agency to give a more current rating at the time that a decision about a career-ladder promotion will be made, consistent with the procedure proposed in § 430.204(m) for within-grade increase decisions. One agency thinks that 5 U.S.C. 4301 *et. seq.* does not authorize OPM to issue regulations with regard to career or within-grade increases.

Two labor organizations object to provisions in § 335.104. Reasons given are that the provisions are contrary to the conditions under which an employee accepts a career ladder promotion, that the provisions replace seniority with competition, that employees rated "Fully Successful" should always be promoted after 1 year, that an exception to the use of merit procedures is given by FPM Chapter 335 for career ladder promotions, and that an employee should not have to compete for his or her own position.

*Discussion:* An agency may, at its discretion, prepare a more current rating of record at the time that the agency is deciding whether an employee should receive a career-ladder promotion. No employee should receive a career-ladder promotion based on a rating of record which is more than 12 months old. The authorities under which OPM is issuing regulations have been included in both the proposed and in these final regulations.

*Change:* Paragraph 335.104(b), which required that agencies give priority consideration for career ladder promotions to employees with the highest ratings, has been deleted from the regulations. However, OPM feels it is not appropriate to consider seniority as the only criterion for career ladder promotions. OPM remains committed to the concept that performance in the employee's current and/or past positions is just as significant as seniority, if not more so, in evaluating employees for career ladder and competitive promotions. OPM is studying how this may be done and may issue a regulatory proposal on the linkage between performance ratings and promotions in the future.

To be consistent with changes in terminology in Part 430, paragraph 335.104(a) has been revised by changing the phrase "most recent summary rating" to the phrase "current rating of record", and the "Fully Successful" rating level has been identified as level 3. (see Issue 14 on Names and Definitions of Rating Levels).

4. *Issue:* Purpose of performance appraisal (§ 430.201 and § 430.204(a)).

*Summary of Comments:* One agency suggests that the word "develop" in § 430.204(a) should be changed to "train" to cover not only enhancement training but also remedial training. One agency prefers a more concise statement of the purpose and use of performance appraisal, such as that found in the PMRS regulations at § 430.402. One labor organization notes that it did not

find methods in the proposed regulations for communicating performance standards to employees on how they will be rated on the accomplishment of organizational goals and objectives.

*Discussion:* OPM agrees that the word "training" is more appropriate than the word "develop" in this section. The word "training" is used in 5 U.S.C. 4302(a)(3).

*Changes:* Sections 430.201 and 430.204(s) have been revised to express the purpose of performance appraisal in performance management, consistent with PMRS regulations, and moved to § 430.201(b). The requirement that the results of performance appraisal be used as a basis for "awards" has been changed to "performance awards" and the word "develop" has been changed to "training".

The final regulations also provide that accomplishment of organizational objectives should, when appropriate, be included in performance plans by incorporating objectives, goals, program plans, work plans, or by other similar means that account for program results.

Although examples are no longer specifically listed, the requirement to use performance ratings as a basis for adjusting base pay includes within-grade increases, Prevailing Rate employee step increases, and quality step increases. A requirement is added at § 430.204(d)(2) that provides that accomplishment of organizational objectives should, when appropriate, be included in performance plans.

5. *Issue:* Coverage (§ 430.202).

*Summary of Comments:* One agency thinks that § 430.202 should be modified to exclude all employees under temporary appointments which will not exceed 1 year.

*Discussion:* OPM does not have the legal authority to exclude positions in the competitive service from performance appraisal requirements. However, agencies may request OPM approval of exclusion of specified excepted service positions from appraisal requirements under the authority of 5 U.S.C. 4301(2)(G). But, since temporary appointments can be extended for longer than 1 year for temporary excepted service positions, exclusion of many of these positions from performance appraisal requirements would not be appropriate.

*Change:* This section has been revised so that it is consistent with PMRS regulations. A sentence has been added stating that employees covered by the PMRS are not covered by this subpart. The exclusion of Schedule C employees from requirements under this subpart has been deleted, consistent with the provision that Schedule C employees are covered by final performance appraisal regulations for PMRS employees.

6. *Issue:* Progress Reviews (§ 430.203).

*Summary of Comments:* Three agencies think that a requirement should be added to the regulations for a progress review meeting between employees and their supervisors, consistent with PMRS regulations. Three agencies recommend that "progress reviews" be defined in the regulations. Three agencies recommend that the sentence "This includes oral and written progress reviews" be deleted from the definition of "appraisal" in § 430.203.

*Discussion:* Since performance appraisal is a process done throughout the year, progress reviews should not be included in the definition of "appraisal". The requirement at 5 U.S.C. 4302(b)(3) for "evaluating each employee during the appraisal period on such standards" supports the concept that at least one progress review discussion should be required during an appraisal period, as is required for PMRS employees.

*Changes:* The second sentence in the definition of "appraisal," referring to progress reviews, is deleted. Also, a new definition of "progress review" is added, consistent with the PMRS regulations. Finally, § 430.205(c) has been added, consistent with PMRS regulations requiring that a progress review be held for each employee at least once during an appraisal period.

7. *Issue:* Other Definitions (§ 430.203).

*Summary of Comments:* Five agencies recommend that, wherever possible, the PMS regulations be revised to provide identical definitions in PMS and PMRS appraisal regulations. One agency recommends that all the definitions reflect the same wording as is used in the PMRS regulations. One agency recommends use of the same definitions as in PMRS regulations for the terms "rating", "rating of record", and "summary rating". One agency recommends that definitions of the following terms be added: "Performance Management Plan", "progress review", "summary rating", and "rating of record".

Four agencies ask that the definition of a "non-critical element" be revised to say that non-critical elements are optional and may be used at agency discretion. One congressional comment states that the definitions of the terms "critical element" and "Unacceptable" are vague and circular and offer insufficient guidance.

One labor organization states that in the definition of "critical element", the phrase "of assigned work" is not resistant to abuse and should not be included. One labor organization believes that a requirement for communication of organizational goals and objectives as they are related to a particular position should be included in the definition of "critical element". One labor organization recommends that the definition of "performance standard" be amended to state that standards must be adjusted to provide for full employee participation in the development of performance standards. One labor organization suggests changing the definition of "ratings" to permit negotiation of the number of descriptive levels for various ratings.

*Discussion:* OPM agrees that the definitions of terms for PMS performance appraisal should be as similar as possible to definitions provided in PMRS regulations. Use of the same definitions will provide greater equity, reduce confusion, and make it easier for everyone to understand and use performance appraisal regulations. (See also Issue 8: "Progress Reviews").

The term "Unacceptable" is not defined in the regulations, but is defined in 5 U.S.C. 4301(3) as performance which fails to meet established performance standards in one or more critical elements of such employee's position. The definition of "critical element" in the final regulations reflects this legal requirement and refers to performance "in the position" instead of performance "of assigned work" as was proposed. The revised language parallels the PMRS definition of "critical element". Although the definition of "critical element" does not require communication of organizational goals and objectives, the final regulations do state that accomplishment of organizational objectives should, when appropriate, be included in performance plans.

Although the definition of "Performance Standard" does not refer to employee participation in establishment of standards, the final regulations do require that each appraisal system encourage employee participation in establishing performance plans. Examples of how this may be accomplished are listed in the regulations. Although five summary rating levels are required by the final regulations, the regulations only require a minimum of three rating levels for each critical element.

*Changes:* Section 430.203 has been revised as follows, consistent with PMRS regulations. The following words have been deleted from the definition of "appraisal period": "and for which a performance rating will be given". The definition of "critical element" has been revised by changing the word "job" to

"position" and by changing the phrase "of assigned work" to "in the position". The definition of "non-critical element" has been revised by changing the word "job" to "position" and the phrase "appraisal and the assignment of an element rating" has been changed to "written appraisal". In addition, a sentence has been added which provides that non-critical elements are optional and may be used at agency discretion.

The definition of "performance" has been revised by changing the phrase "of assigned duties and responsibilities" to the phrase "of assigned work". A definition of "Performance Management Plan" has been added which corresponds to the same definition in the PMRS regulations. The term "rating" has been changed to "summary rating" and the definition has been revised by changing the phrase "and overall performance" to the phrase "and the assignment of a summary rating level (as specified in § 430.208(a) and (b) of this subpart)." A new definition of "rating of record" has been added, which parallels the definition of the same term in the PMRS regulations, except that it does not include the phrase "including the written notice at any time that an employee's performance is unacceptable on one or more critical elements".

8. *Issue:* Requirement to Establish Appraisal Systems (§ 430.204(a)).

*Summary of Comments:* One agency thinks that the statutory reference should be to 5 U.S.C. 4302, not 5 U.S.C. 4302(a).

*Discussion:* 5 U.S.C. 4302(a) referred to paragraph "a" of section 4302, not to § 4302a, which provides for establishment of appraisal systems for PMRS employees.

*Change:* This section has been revised, consistent with PMRS regulations, by eliminating the phrase "As required by 5 U.S.C. 4302(a)" and by changing the requirement to say that agencies shall "develop one or more performance appraisal systems for employees covered by this subpart" instead of saying that agencies "shall establish one or more appraisal systems for appraising the work performance of employees during an appraisal period".

9. *Issue:* Requirement for Appraisal and Rating Based on Established Performance Plans (§ 430.204(b) and § 430.204(i)).

*Summary of Comments:* One agency suggests revision of the second sentence of § 430.204(b) to say that an employee's performance must be appraised and rated on each critical element and in comparison to the relevant performance standard. One agency recommends that § 430.204(i) be clarified to provide that, in appraising employees, no consideration extraneous to performance as compared to standards may be given.

*Discussion:* OPM agrees that performance must be appraised and rated by comparison of actual performance to established performance standards. This requirement was proposed in § 430.204(i). It is also important that, to the extent feasible, individual performance plans reflect each employee's expected contribution to the accomplishment of established organizational objectives. In order for performance plans to be utilized as expected, they must be provided to employees as near to the beginning of established appraisal periods as possible.

*Changes:* Section 430.204(b), except for the last sentence, has been revised by adding the phrase "Under each appraisal system" and by deleting the words "and rated" from the second sentence. However, the requirement for appraisal on each element has been added under requirements for ratings in § 430.206(b). The requirement for appraisal on each element is also repeated in § 430.205(c), consistent with PMRS regulations.

Also, consistent with PMRS regulations, the first sentence of § 430.204(i) has been moved to § 430.204(d)(1), and revised slightly by adding that elements as well as standards must be based on requirements of employees' positions. Another revision states that performance plans must normally be provided to employees within 30 days after the beginning of each appraisal period. Finally, a new § 430.204(d)(2) has been added consistent with PMRS regulations providing that when appropriate, accomplishment of organizational objectives should be included in performance plans by incorporating objectives, goals, program plans, work plans, or by other similar means that account for program results.

10. *Issue:* Sub-elements (§ 430.204(b)).

*Summary of Comments:* Two agencies recommend deletion of the restriction on rating sub-elements, as was done in the final PMRS regulations. One agency thinks that agencies should be able to rate sub-elements. One labor organization states that MSPB decisions provide for balancing the rating on one component of an element against the ratings on other components of an element.

*Discussion:* The restriction on rating sub-elements was intended to discourage agencies from defining elements very narrowly and from defining numerous elements. However, in an effort to parallel PMRS regulations and provide agencies with flexibility in this area, the restriction on sub-elements was re-examined.

*Change:* The last sentence of § 430.204(b), prohibiting assignment of ratings to sub-elements, has been deleted.

11. *Issue:* Pass/fail Elements (§ 430.204(c)).

*Summary of Comments:* Two agencies cite an MSPS decision that states that pass/fail elements are properly used in cases where failure to meet the standard would result in death, injury, breach of security, or monetary loss. One agency recommends that the regulation discourage, rather than prohibit, pass/fail elements. One agency thinks that OPM should permit pass/fail non-critical elements.

*Discussion:* In *Calloway* v. *Department of the Army*, 23 M.S.P.B. 592 (1984), the Merit Systems Protection Board ruled that absolute performance standards may be compelled in certain circumstances. It should be noted that a pass/fail or absolute standard is not the same as a pass/fail element. It is evident that the restriction on pass/fail elements has been misinterpreted and has caused confusion.

*Change:* The last sentence of § 430.204(c), which prohibited use of pass/fail elements, has been deleted.

12. *Issue:* Number of Rating Levels for Individual Elements and Levels for Which Written Standards are Required (§ 430.204(c)).

*Summary of Comments:* One agency and two labor organizations think that the absence of performance standards for a rating level should negate a rating at that level. One labor organization believes that a rating should not be permitted unless standards are written at one contiguous rating level, citing FPM Letter 430–4, Statutory Requirement Concerning Use of Single and Multiple Performance Standards Under Non-SES Performance Appraisal Systems. One labor organization states that if there is only one critical element and three element rating levels, it is not possible to derive five summary rating levels, and recommends that there be an equal number of element and summary rating levels. One agency opposes a requirement for performance standards at the Fully Successful rating level, and states that such a requirement would be costly and would take time to implement.

*Discussion:* It is very time-consuming and costly for agencies to prepare performance standards at several rating levels. Most employees are likely to

meet the "Fully Successful" standards and, for them, additional standards are not useful of needed. Each employee should be told what the requirements are for "Fully Successful" performance. If they have not already been provided, performance standards which indicate minimum performance requirements for retention must be given to those few employees whose performance is determined to be "Unacceptable", to meet legal requirements. Also, agencies are encouraged to write standards at more than one level to clarify performance requirements. However, due to cost or time considerations, this may not always be possible and, therefore, is not required. To avoid unnecessary confusion, guidance will be issued to provide additional interpretation on the subject of multiple standards.

Concerning the use of one element having only three rating levels, it would be unusual to have only one performance element since this would probably not reflect all the duties of the employee's position. However, if it did occur, undoubtedly the (required) rating levels would equate to "Unacceptable", "Fully Successful" and "Outstanding", which could then equate to the same summary rating levels.

*Changes:* This language has been moved to § 430.204(e). The only change is that the paragraph provides that in addition to the "Fully Successful" level, performance standards for all critical and non-critical elements may be written at other levels, which had previously only been implied. In addition, consistent with the PMRS regulations, new language at § 430.204(j)(2) provides that at the time that an agency identifies critical element(s) for which performance is "Unacceptable", an employee must be informed of the performance standards that must be reached in order to be retained.

13. *Issue:* Rules or Procedures for Deriving Summary Ratings (§ 430.204(d)).

*Summary of Comments:* Two agencies think that the requirement to use decision tables for deriving summary ratings is unduly restrictive and might preclude use of numerical procedures or narrative rules for deriving summary ratings. One agency suggests that the requirement for deriving summary ratings should be the same as stated in the final PMRS regulations. One agency objects to the statement that an "Unacceptable" rating on one critical element must result in an "Unacceptable" summary rating, citing 5 U.S.C. 4303(a).

*Discussion:* Although 5 U.S.C. 4303(a) states that an employee may be reduced in grade or removed for unacceptable performance, 5 U.S.C. 4302(b)(6) states that appraisal systems shall provide for reassigning, reducing in grade, or removing employees who continue to have unacceptable performance. Unacceptable performance is defined in 5 U.S.C. 4301(3) as failure to meet performance standards in one or more critical elements of the employee's position.

The use of the phrase "decision tables" was not intended to preclude use of numerical procedures or narrative rules for deriving summary performance ratings from ratings on elements.

*Changes:* The language in § 430.204(d)(1) has been revised, consistent with the final PMRS regulations, and moved to § 430.204(g). Each appraisal system must describe the method to be used by the agency to derive summary ratings. The method must show that more weight will be given to critical elements than to non-critical elements.

Also, consistent with PMRS regulations, § 430.204(d)(2) has been revised and included in the definition of a "critical element" in § 430.203, indicating that a critical element is so important that unacceptable performance on the element would result in unacceptable performance in the position.

14. *Issue:* Names and Definitions of Rating Levels (§ 430.204 (d) and (h)).

*Summary of Comments:* Eight agencies recommend that the definitions of the rating levels be deleted, and that language be adopted which was used to describe summary rating levels in the final PMRS regulations. One agency thinks that the definitions did not appear to permit numerical procedures for deriving summary ratings from ratings on performance elements. One labor organization states that the definitions required peer comparisons and are illegal. One agency thinks that the definitions are ambiguous. Seven agencies request more flexibility in naming their rating levels. Five agencies suggest that names of rating levels should be consistent with those for PMRS employees.

*Discussion:* The definitions of rating levels were intended to indicate the level of difficulty of each rating level. They were not intended to be used to derive summary ratings from ratings on performance elements. They also were not intended to encourage peer comparison as opposed to comparison of an employee's actual performance to established performance standards. Each agency is encouraged to establish generic descriptions of the level of difficulty of each rating level as a guide for employees, supervisors, and approving officials for establishing performance requirements.

*Change:* Consistent with the final PMRS regulations, the definitions of the five rating levels have been deleted. Instead, § 430.204(h) provides for five summary rating levels and identifies them as levels 1 through 5 (with only the "Fully Successful" and "Unacceptable" levels described by adjective names).

15. *Issue:* Performance Improvement Plan (PIP) (§ 430.204(e)).

*Summary of Comments:* Seventeen agencies comment that the PIP provisions should be deleted from the PMS regulations. One reason given by all of these agencies is to achieve consistency with the PMRS regulations, where the PIP requirement was deleted. Other reasons for deleting the PIP included: The PIP will delay corrective actions by triggering a new appraisal period; the PIP will discourage managers from taking corrective actions; the PIP has been made unnecessary by MSPB decisions; requiring that assistance be provided to employees is a more constructive approach; the PIP is redundant with 5 CFR Part 432 procedures; and the PIP is confusing, burdensome, and requires unnecessary paperwork. One agency questions the applicability of the PIP requirements.

*Discussion:* It is evident from the many comments received that the PIP was viewed as redundant with the requirement to provide an opportunity to demonstrate acceptable performance. As stated above, OPM agrees that there should be parallelism with the PMRS regulations. Also the guidance provided in FPM Letter 430–4, which strongly contributed to the rationale behind the PIP, is being clarified, making the PIP unnecessary.

*Change:* The requirement for the PIP is removed from the regulations and its objective is met by the addition, at § 430.204(j)(2), of the requirement that an employee be informed of the performance standard necessary for retention in the position at the time that an agency identifies the critical element(s) for which performance is "Unacceptable". This change provides the same concept in a more streamlined, clearer manner, and fully takes into consideration the requirements of 5 U.S.C. 4302(b)(6). The new language is also more consistent with the PMRS regulations.

Also, consistent with the PMRS regulations, a provision has been added at § 430.204(i) that agencies must assist

employees in improving performance rated below the "Fully Successful" level.

16. *Issue:* Written Justification for an "Outstanding" Summary Rating (§ 430.204(f)).

*Summary of Comments:* Two agencies think that a well documented rating is sufficient justification for an Outstanding summary rating. One agency states that this requirement creates unnecessary and duplicative paperwork. One agency suggests that this requirement should be deleted, consistent with PMRS regulations. One agency states that this requirement is inconsistent with the guidance in FPM Letter 430-4.

*Discussion:* OPM agrees that a well-documented performance rating is sufficient justification for an "Outstanding" rating. Agencies may prepare performance standards above the "Fully Successful" level at their discretion. To avoid unnecessary confusion, the guidance provided in FPM Letter 430-4 is being clarified.

*Change:* Paragraph 430.204(f) is deleted, consistent with the PMRS regulations.

17. *Issue:* Pre-established Distributions of Ratings (§ 430.204(g)).

*Summary of Comments:* One agency suggests revising this paragraph so that it is consistent with language in the PMRS regulations. One agency suggests that this paragraph should also state that ratings cannot depend on the rating received by the employee's supervisor.

*Discussion:* The language of this paragraph was clarified when final PMRS regulations were prepared. OPM agrees that the same language should be used here. This prohibition may be interpreted to prohibit ratings based on the rating given to an employee's supervisor.

*Change:* This language has been moved to § 430.206(d) and has been revised, consistent with the PMRS regulations, to prohibit an agency from prescribing a distribution of ratings for employees.

18. *Issue:* Higher Level Review (§ 430.204(g), (n) and (o)).

*Summary of Comments:* Two agencies recommend that higher level review be limited to the highest local agency official. One agency suggests adding the phrase "unless there is no higher official in the agency" to the requirement for approval of performance plans. One agency thinks that higher level review of personnel decisions presents serious procedural difficulties. One agency suggests that there should be no requirement for approval of periodic (interim) ratings. One agency says that higher level review adds paperwork, adds a level to the grievance process, and conveys little faith in supervisors. One agency suggests that the language on higher level review in § 430.204(g) be revised consistent with the final PMRS regulations. One agency says that approval of a within-grade increase (WGI) decision is pointless once a performance rating has received higher level approval.

Two agencies and one labor organization object to an outright prohibition of discussion of a summary rating with an employee before it is approved. One labor organization states that restricting communication prior to approval of a rating violates the Privacy Act. Two agencies recommend that language on communication of ratings be revised consistent with the final PMRS regulations.

*Discussion:* Higher level approval ensures that supervisors are accurately appraising employee performance and using the results appropriately as a basis for personnel decisions. Higher level approval also ensures that higher level officials get involved with performance planning and assessment, so that organizational objectives may be achieved. Higher level approval is essential to productivity improvement, accountability, and pay-for-performance objectives. However, in the review of performance plans, OPM recognizes that certain unique situations might make it difficult or not feasible to carry out this requirement, e.g., lack of knowledge of the work by a higher level reviewer at a distant geographical location. Therefore, OPM feels that some flexibility is warranted in this situation.

*Changes:* Consistent with PMRS regulations, § 430.206(d) provides that agencies are to establish procedures to ensure that only employees whose performance exceeds normal expectations are rated above "Fully Successful." The procedures must be described in agency Performance Management Plans.

Section 430.204(n) has been moved to § 430.204(f). The section has been revised by using the phrase "performance plans" and by indicating that approval must occur at the beginning of the appraisal period, consistent with final PMRS regulations. To allow agencies some flexibility in accounting for unique situations which would make this provision difficult to accomplish, language has been provided to allow agencies to describe exceptions to higher level review and approval of performance plans in their Performance Management Plans, subject to OPM approval.

Section 430.204(o) has been moved to § 430.206(c). To reflect changes in terminology elsewhere in Part 430, this section has been revised to refer to ratings of record instead of periodic ratings. Consistent with final PMRS regulations, the section now states that higher level review does not preclude communication about appraisal of performance between a supervisor and an employee. Also consistent with PMRS regulations, language has been added requiring approval of ratings of record by official(s) with responsibility for managing the performance awards budget within the agency. In addition, language has been added which provides that agencies may describe exceptions to higher level approval of ratings of record and performance-based personnel actions in their Performance Management Plans, subject to approval by OPM.

19. *Issue:* Employee Participation (§ 430.204(i)).

*Summary of Comments:* One agency thinks that the requirement to encourage employee participation in establishing performance plans should not be changed to require joint participation. Two agencies suggest adding a sentence providing that supervisors have the final decision on the content of performance plans. A congressional comment states that the regulations should guarantee that workers have the opportunity to discuss and agree on the critical elements of a position.

*Discussion:* 5 U.S.C. 4302(a)(2) requires that employee participation be encouraged in establishing performance standards for GS and Prevailing Rate employees, while 5 U.S.C. 4302a(a)(2) requires the joint participation of the supervising official and the PMRS employee in developing performance standards, with authority for establishing standards resting with the supervising official.

*Change:* The requirement for employee participation has been moved to § 430.204(c), and has been revised to require employee participation in establishment of performance plans, not just standards, consistent with PMRS regulations. Also, consistent with PMRS regulations, language has been added to provide examples of how employee participation may be accomplished and to clarify that final authority for establishing performance plans rests with supervising officials.

20. *Issue:* Basis for Performance Standards (§ 430.204(j)).

*Summary of Comments:* Two agencies suggest that this paragraph should be revised to indicate that elements and standards should be consistent with employees' position descriptions, as well as related to their assigned work.

*Discussion:* Performance management systems cannot work unless performance elements and standards reflect duties and responsibilities actually performed by the employee. While position descriptions must be kept up to date and must be accurate, the overriding consideration is that performance plans and ratings reflect the employee's actual work assignments.

*Change:* The requirement in § 430.204(j) that performance plans be related to employees' "assigned work" has been revised, consistent with PMRS regulations, to say that performance elements and standards must be based on requirements of the employees' "positions". This requirement has been moved to § 430.204(d)(1).

21. *Issue:* Consideration of Ratings from an Entire Appraisal Period (§ 430.204(k)).

*Summary of Comments:* One agency recommends a modification to permit consideration of an "interim" rating, prepared when an employee transfers, when preparing an annual rating. One agency thinks that consideration should be given to all ratings prepared during an appraisal period when arriving at an annual rating, consistent with PMRS regulations. A congressional comment states that appraisals should be performed throughout the period of employment and not just once a year.

*Discussion:* OPM agrees that a rating should be prepared for all periods of employment equal to or exceeding the agency's minimum appraisal period, and should be considered in preparing the employee's (usually annual) rating of record.

*Change:* The first and second sentences of this section have been moved to § 430.205(a) where they more appropriately fit the description of an appraisal period. The third sentence, concerning the derivation of the rating of record from ratings during the year, has been incorporated into the last sentence of § 430.205(a). Consistent with PMRS regulations, the requirement now specifies that an employee must be given a summary rating when he or she changes positions during the appraisal period and that the rating must be taken into consideration in deriving the employee's next rating of record. In addition, § 430.206(a) has been added, consistent with PMRS regulations, requiring that a written rating of record be given to each employee as soon as practicable after the end of the appraisal period.

22. *Issue:* Ratings to be Used in Reduction-In-Force (RIF) Procedures (§ 430.204(l)).

*Summary of Comments:* Three agencies oppose giving a special rating just before a RIF. One agency suggests requiring extension of appraisal periods, consistent with § 430.407(f) of the PMRS regulations. One agency asks if a new rating must be prepared if an employee's rating of record is not an annual rating. One agency recommends that the language of this section be consistent with § 351.504(d) of the RIF regulations. One agency recommends deleting this section. One agency requests clarification of the rating to be used for RIF if the employee has not served for the minimum appraisal period.

*Discussion:* Requirements on providing credit for performance in reduction-in-force procedures are found in the reduction-in-force regulations, 5 CFR Part 351. It is necessary for agencies to prepare performance ratings for employees each year, so that the ratings will be available and can be used for RIF and for other performance-based determinations. This standard procedure usually precludes a need for special-purpose ratings prepared for a specific personnel action.

*Change:* Section 430.204(1) has been deleted from the regulations. Section 430.206(e) has been added, consistent with PMRS regulations, providing that, if a rating of record cannot be prepared at the time specified in the plan, the employee's appraisal period shall be extended for the amount of time necessary to meet the minimum appraisal period, at which time a rating of record shall be prepared.

23. *Issue:* Minimum Appraisal Period and Determining the Rating of Record (§ 430.204(m)).

*Summary of Comments:* One agency notes that a 90-day minimum appraisal period is not consistent with the requirement in the PMRS regulations that written performance plans be provided to employees normally within 30 days after the beginning of an appraisal period. One agency recommends a minimum appraisal period of 60 to 90 days. Two agencies recommend a minimum appraisal period of 90 to 120 days.

Three agencies think that the second sentence of § 430.204(m) was not clear. One agency recommends that the sentence be deleted or revised. One agency asks how ratings for newly appointed and transferred employees are to be determined. One agency objects to permitting only annual ratings to be used, except where another type of rating is specifically permitted by law or regulation.

*Discussion:* Agencies commonly have either a 90-day or a 120-day minimum appraisal period. This refers to the amount of time that an employee has served under an approved performance plan which has been communicated to him or her.

It is recognized that agencies will not always be able to wait 12 months before preparing a rating of record. However, they must wait at least until after the minimum appraisal period. Also, the minimum appraisal period is intended to ensure that agencies are able to determine ratings for newly appointed and transferred employees in the same manner as for PMRS employees.

*Change:* The first sentence of § 430.204(m) has been revised and moved to § 430.205(b). Consistent with PMRS regulations, the paragraph now provides that agency appraisal systems establish a minimum appraisal period of at least 90 days but not more than 120 days.

The second sentence of § 430.204(m) has been deleted. In place of that sentence, language parallel to PMRS regulations has been provided at § 430.205(a) and § 430.206 (e) and (f). These paragraphs specify how a rating of record will be determined when one cannot be prepared at the (usually annual) time specified in the agency plan, when an employee is transferred, and when an employee changes positions during an appraisal period.

24. *Issue:* Performance Rating for a Within-Grade Increase (§ 430.204 (m)).

*Summary of Comments:* Five agencies prefer to prepare a justification or supplementary statement when a within-grade increase decision is not consistent with an employee's most recent rating of record. These agencies object to the requirement for preparing a more current rating of record which supports the decision. One agency states that the preparation of a more current rating is duplicative of the notice of determination requirement in 5 CFR 531.409(e).

*Discussion:* Consistent with the requirement for use of a rating of record as the basis for all performance pay decisions for PMRS employees, a rating of record is to be used as a basis for within-grade increase (WGI) determinations for GS employees. Therefore, use of a written justification, which is contrary to the employee's rating of record, as a basis for within-grade increase determinations, would be inconsistent with pay-for-performance principles.

The notice of determination requirement of § 531.409(e) is not duplicative of providing a rating of employee performance because the employee is specifically informed whether his or her performance meets

performance requirements for a within-grade increase and notifies an employee whose within-grade increase is denied of how performance must improve and of his or her right to request reconsideration of the determination.

*Change:* The third sentence of § 430.204(m) has been revised slightly and moved to § 531.404(a)(1), covering WGI determinations. The requirement now provides that when a within-grade increase decision is not consistent with the employee's most recent rating of record, a more current rating of record must be prepared.

25. *Issue:* Reconsideration of a Performance Rating (§ 430.204(p) and § 771.206(c)(3)).

*Summary of Comments:* Two agencies suggest that reconsideration and grievance language should be consistent with PMRS regulations. One agency thinks that there should be only one procedure for review of performance ratings. One agency states that the agency grievance procedure should be the only procedure available for review of ratings for both PMRS and PMS employees. One agency asked if reconsideration of ratings can be under either the administrative or negotiated grievance procedures. Two labor organizations state that ratings are subject to review under negotiated grievance procedures. One labor organization says that ratings are also subject to review by the MSPB Special Counsel. A congressional comment states that appeal of a rating should be a level above the supervisor who issued the appraisal.

*Discussion:* While a reconsideration procedure for an appraisal is required by 5 U.S.C. 4302a(c)(2) for PMRS employees, no parallel requirement is found in 5 U.S.C. 4302 for GS and Prevailing Rate employees. Furthermore, it is evident that this process is confusing and could easily duplicate the function of the agency grievance procedure, and/or the "additional procedures established at the discretion of the agency head" specified in the last sentence of § 430.204(p).

*Change:* Section 430.204(p) has been deleted. Section 771.206(c)(3), which provided agency discretion to exclude performance ratings from the agency administrative grievance procedure, has also been deleted.

26. *Issue:* Appraisals and Ratings for Details and Temporary Promotions (§ 430.204 (q) and (r)).

*Summary of Comments:* One agency recommends a clarification that a rating for a detail or temporary promotion must be considered in preparing an annual rating. One agency thinks that paragraph (q) should not refer to a 120-day period, but rather to a minimum appraisal period or longer established by the agency. One agency recommends a definition of "rating of record" similar to that in the PMRS regulations to help clarify the nature of ratings for details and temporary promotions. One labor organization thinks that it is unfair to rate an employee's performance in a job other than the one for which he/she was hired.

One agency states that paragraph (r) should be rewritten to conform with § 430.406(d) in the PMRS regulations. One agency states that it does not appear to be necessary to extend an employee's rating because there are no pay deadlines for GS and Prevailing Rate employees. One agency says that paragraphs 430.204 (r)(2) and (r)(3) should have broader application than to details or temporary promotions and recommends that a supervisor have discretion to extend the last rating or use a "presumptive" rating. One agency points out that a reference to § 531.409(d) should be to § 531.408(d). One agency suggests that paragraph (r) be revised to provide for extending the rating period and, if that is not feasible, to provide for extending the rating of record.

*Discussion:* An employee's performance throughout an entire appraisal period should be considered when preparing the employee's (usually annual) rating of record. This includes periods of time when an employee is detailed or temporarily promoted to another position. Note, however, that performance-based reductions-in-grade and removals must be based on the critical element(s) of the employee's position (5 U.S.C. 4303(b)).

*Change:* Section 430.206(e) now provides that an employee's appraisal period must be extended if a rating of record cannot be prepared at the time specified in the agency's Performance Management Plan. Section 430.205(d)(1) now provides the same requirements for employees detailed or temporarily promoted within the same agency as were proposed in § 430.204(q), except that the phrase "annual summary rating" has been changed to "rating of record." Section 430.205(d)(2) provides revised requirements for employees detailed outside the agency using the same language as is applicable for PMRS employees. The section revises § 430.204(r) and provides for making a reasonable effort to obtain appraisal information from an outside organization, which must be considered in deriving the employee's next rating of record.

27. *Issue:* Recommendation for Recognition of Outstanding Employees (§ 430.204(t)).

*Summary of Comments:* Two agencies object to requiring monetary recognition for "Outstanding" employees. One agency objects to mandatory awards for outstanding employees, stating that career ladder promotions provide adequate recognition for outstanding performance. One agency notes that it is not always appropriate to recognize "Outstanding" employees, such as when an employee has disciplinary problems. Two agencies oppose requiring a recommendation for awards, citing the extra paperwork required. They feel that performance ratings should be sufficient justification for performance awards.

One agency thinks that agencies should be required to recognize "Outstanding" employees through monetary, non-monetary or honorary awards. One agency states that cash awards should be mandated for PMS employees rated Outstanding, consistent with PMRS regulations.

*Discussion:* See also agency comments and final regulations on performance awards. OPM agrees that performance awards should be based on performance ratings and that additional justification is not necessary where an employee has received a properly documented "Outstanding" performance rating.

*Change:* Section 430.204(t), which required a recommendation for appropriate recognition of "Outstanding" employees, has been deleted.

28. *Issue:* Performance Ratings of Disabled Veterans (§ 430.204(u)).

*Summary of Comments:* None.

*Change:* Consistent with PMRS regulations, this section has been slightly revised to refer to "the performance appraisal and resulting rating" of a disabled veteran. The section has also been moved to § 430.205(i).

29. *Issue:* Training and Evaluation (§ 430.205).

*Summary of Comments:* None.

*Change:* Consistent with PMRS regulations, this section has been slightly revised to say that the purpose of training and evaluation is to "assure that the requirements of law will be effectively implemented". In addition, the results of evaluations must be used to "implement improvements as needed" instead of "to improve the systems". This section has been moved to § 430.208.

30. *Issue:* OPM Review of Appraisal Systems (§ 430.206).

*Summary of Comments:* One agency thinks that agencies rather than OPM should be responsible for reviewing appraisal systems for their "contribution to agency effectiveness and efficiency".

*Discussion:* While OPM agrees that this review cannot fully assess the contribution of an appraisal system to agency effectiveness and efficiency, the review should include an assessment of conformance of systems with FPM guidance.

*Change:* Consistent with PMRS regulations, this section has been revised by deleting the requirement for OPM review of appraisal systems "with respect to their contribution to agency effectiveness and efficiency". Language has been added stating that OPM will review appraisal systems to determine conformance with "OPM performance management policy". This section has been moved to § 430.209. Also, § 430.210 has been added which provides that agencies must submit performance appraisal plans to OPM for approval as part of agency Performance Management Plans in accordance with Subpart A of Part 430 and provisions of Subpart B.

31. *Issue:* OPM Review and Approval of Performance Management Plans (§§ 430.207 and 431.207).

*Summary of Comments:* Four agencies comment on the provisions for OPM review and approval of agency performance management plans. Two agencies suggest that, to save them time and paperwork in initial implementation, OPM should review agencies' performance management plans after the plans are in operation. One of these agencies thinks this post-implementation review would assist in defending the plan before third-party agencies. One agency thinks the provision for OPM review and approval is unnecessary, but requests final regulations and guidance as soon as possible if the provision is retained. One agency objects to submitting the results of its performance management system operations to OPM, i.e., previous years' and projected expenditures.

One labor organization comments that the demonstration projects proposed at § 430.207(d) would not include an expanded scope of bargaining and therefore provide little chance to test private sector principles in Government. The labor organization also states that some of the ideas in the proposed regulations could be tested in a demonstration project and refined before possible implementation Government-wide.

*Discussion:* OPM is required by statute (5 U.S.C. 4304(b)(1) to "review each performance appraisal system developed by any agency . . . and determine whether the performance appraisal system meets the requirements" of the law. Those legal requirements include the linkage of performance appraisal results to "recognizing and rewarding employees" (5 U.S.C. 4302(b)(4)) and other personnel actions. To assist agencies in managing their employees' performance to accomplish agency missions, OPM has established the Performance Management System, integrating all performance-related actions. To meet the requirement to review agency systems for legal compliance, OPM must review the plans prior to their implementation, because so many consequences result from performance appraisal results. Further, OPM will need reports of the results of performance management plan operations to evaluate accurately the operation of the performance management system.

OPM believes these performance appraisal regulations should not include requirements on demonstration projects authorized by 5 U.S.C. 4703. OPM has previously issued regulations for demonstration projects at 5 CFR Part 470.

*Change:* Only editorial changes have been made to the regulations on OPM review and approval of performance management plans. To support and clarify the concept of performance management, these requirements have been placed in the new Subpart A of Part 430. Subpart A also assists agencies by consolidating agency performance management responsibilities in one place in the regulations. Section 430.207(d), on demonstration projects, has been deleted.

32. *Issue:* Conversion of a Position to Another Pay System.

*Summary of Comments:* One agency suggests adding a provision that ratings of employees whose positions are converted from a Prevailing Rate pay system to the GS may be used as a basis for performance-related personnel decisions under the GS, provided that both positions have the same duties and responsibilities. A similar provision is recommended when positions are converted from the GS to a Prevailing Rate Pay system.

*Discussion:* OPM agrees that, prior to the time when a new performance rating will be prepared after the conversion of a position to a new pay system, a performance rating prepared for an employee performing the same duties and responsibilities should continue to be used.

*Change:* A new § 430.204(k) has been added, consistent with § 430.405(k) of the PMRS regulations, which provides that when an employee's position under any Federal pay system is converted to a pay system covered by Subpart B of 5 CFR Part 430, the employee's rating of record will be considered to have been derived under 5 U.S.C. 4302 and from the position which the employee now occupies.

33. *Issue:* Procedure When Employee's Performance is Unacceptable.

*Summary of comments:* Six agencies state the performance appraisal provisions of the PMRS and the PMS should be similar, wherever possible. One agency states that PMRS and PMS performance appraisal provisions on treatment of employees rated below "Fully Successful" should be consistent to the extent feasible. Also, see agency comments and regulation changes under Issue 15, "Performance Improvement Plans".

*Discussion:* Legal requirements are somewhat different for PMRS employees than for PMS employees when performance on one or more critical elements is unacceptable. Section 4302a(b)(6) of title 5 U.S.C. provides that PMRS employees must receive a written notice of an "Unacceptable" rating before an opportunity to raise the employee's performance to the "Fully Successful" level is provided. On the other hand, 5 U.S.C. 4302(b)(6) does not require that a PMS employee receive a rating before being provided an opportunity to demonstrate acceptable performance nor, for that matter, at the end of an opportunity period.

Instead, an agency should provide a written notice to an employee at the beginning of an opportunity period which identifies critical element(s) for which performance is unacceptable and identifies performance standards which must be reached in order for the employeee to be retained in the position. Such a notice and an agency's determination about the level of an employee's performance at the end of an opportunity period are part of an agency determination that will be appealable to the Merit Systems Protection Board should the employee subsequently be reduced in grade or removed for unacceptable performance. The agency decision must be reviewed and approved as required by § 430.206(c) before the decision is final and subject to appeal.

Under PMRS regulations, if an employee's performance improves to level 2, but not to the "Fully Successful" level, an additional opportunity to demonstrate performance at the "Fully Successful" level is required. The difference in legal requirements does not

necessitate an additional opportunity period for PMS employees. However, § 430.204(j) requires that agencies assist employees in improving performance rated below the "Fully Successful" level.

*Change:* A new § 430.204(j) has been added which is consistent with § 430.405(j) of the PMRS regulations except where differences in legal requirements are reflected as discussed above.

34. *Issue:* General Comments on Performance Appraisal for the Senior Executive Service (Part 431).

*Summary of Comments:* Five agencies support revising the SES performance appraisal regulations to make them as parallel as possible with performance appraisal provisions of the PMRS. Two agencies object to making parallels with PMRS.

*Discussion:* As indicated above in the "Overview" section, OPM agrees that wherever possible there should be consistency among the performance appraisal provisions for the SES, PMRS, GS, and Prevailing Rate Systems. This will foster ease of administration, reduce confusion, and clearly support an equitable pay-for-performance system. OPM believes that consistency and equity can be achieved while preserving congressional intent as reflected in statutory differences between the Senior Executive Service and the other systems.

*Change:* The provisions for Senior Executive Performance Appraisal are moved from Part 431 to Part 430, Subpart C and revised to provide for as much consistency as possible among performance appraisal systems for employees covered by the PMRS, SES, GS and Prevailing Rate Systems.

35. *Issue:* Definitions (§ 431.203).

*Summary of Comments:* Two agencies think that all definitions should be consistent with those in the PMRS. Three agencies request that "appraisal" be defined, as in the PMRS regulations, deleting reference to progress reviews; one requests that OPM add a separate definition of "progress review" as defined in PMRS regulations; two agencies suggest defining "critical element" as it is in PMRS, and one agency suggests revising the definition of "non-critical element", to indicate that these elements are optional. Two agencies request clarification of "rating official"; and one agency recommends revision of the definition of "performance".

*Discussion:* OPM agrees that wherever possible definitions should be consistent among performance appraisal systems except where definitions specific to the SES are provided in statute.

*Change:* Definitions are now contained in § 430.303 and have been revised to the extent possible to be consistent with the PMRS and the PMS (see discussion of progress reviews in Issue 6).

36. *Issue:* Use of Critical Elements, Non-critical Elements, Sub-elements, and Pass/Fail Elements (§ 431.204(b) and (c)).

*Summary of Comments:* Four agencies commented on the prohibition against rating employee performance on sub-elements, three objecting and one requesting clarification. Those objecting point to a recent MSPB decision allowing agencies to rate on sub-elements. One agency suggests requiring the use of critical elements only. One agency suggests that pass/fail elements should be allowed, citing a recent MSPB decision.

*Discussion:* (See Issues 10, 11 and 13.)

*Change:* Provisions on use of critical and non-critical elements have been placed in § 430.304. The last sentence in § 431.204(b) on sub-elements has been deleted and language in § 431.204(c) has been revised to remove the prohibition on pass/fail elements.

37. *Issue:* Use of Five Summary Rating Levels, and Requirement for Agency Decision Table to Arrive at Summary Ratings (§ 431.204(d)).

*Summary of Comments:* Two agencies disagree with using five summary rating levels, preferring the option to use three or four. One agency concurs with using five levels.

Five agencies object to the specific adjective labels prescribed for each of the rating levels; three of those objecting suggest paralleling PMRS rules, which provide for numbered rating levels (i.e., level 1 through level 5).

Three agencies think OPM should remove the requirement to use a decision table to derive summary ratings, because it is mechanistic and does not allow for supervisory judgment. One agency thinks that OPM should prescribe a Government-wide decision table all agencies must use.

*Discussion:* (See Issues 13 and 14.)

*Change:* The language in § 431.204 has been revised, consistent with the PMRS regulations, and moved to § 430.304. The definitions of the five rating levels have been removed. Section 430.304(g) provides for five summary rating levels and identifies them as levels 1 through 5. Adjective names are provided for levels 1 through 3 consistent with 5 U.S.C. 4314(a), permitting agency discretion to name the two levels about "Fully Successful". Additionally, reference to using a decision table has been removed, and language added to reflect that agencies must describe the method use to derive summary ratings and that the method must show that more weight will be given to critical elements than to non-critical elements.

38. *Issue:* Unsatisfactory Performance (§ 431.204(d)(2)).

*Summary of Comments:* Two agencies state that OPM should remove the requirement that an executive be given an unacceptable rating if his/her performance on one critical element is unacceptable.

*Discussion:* OPM believes that this regulatory provision reflects the statutory intent in 5 U.S.C. 4312(a) and is equitable with a similar provision in the PMRS and PMS regulations.

*Change:* This requirement has not been removed, but has been incorporated into the definition of "critical element" in § 430.303.

39. *Issue:* Performance Improvement Plan (PIP) (§ 431.204(e)).

All seven agencies commenting on the provision for a Performance Improvement Plan for executives request that OPM remove the provision. Five agencies say that the regulations should parallel the PMRS, and two object to the burden imposed by the PIP, believing it contrary to the intent of the Civil Service Reform Act to facilitate the removal of poor performers.

*Discussion:* (See Issue 15.)

*Change:* Language in § 431.204(e) providing for the PIP has been removed, consistent with the PMRS and PMS regulations.

40. *Issue:* Written Justification for "Outstanding" Rating (§ 431.204(f)).

*Summary of Comments:* Two agencies object to the requirement to write a justification for each "Outstanding" rating because of the additional paperwork; one thinks that the nature of the justification should be optional with the agency.

*Discussion:* (See Issue 16.)

*Change:* Paragraph 431.204(f), requiring written justification for an "Outstanding" rating, has been removed.

41. *Issue:* Definitions of the Five Summary Rating Levels (§ 431.204(h)).

*Summary of Comments:* Four agencies object to the rating level definitions provided in the proposed regulations. Three think that the definitions place too much emphasis on quantity and timeliness, which do not appropriately reflect SES work. One agency thinks that the regulations should require numbered rating levels, rather than the adjective labels in the proposed regulations.

*Discussion:* (See Issue 14.)

*Change:* Consistent with PMRS regulations, definitions of rating levels have been removed.

42. *Issue:* Establishment of Performance Standards (§ 431.204(i)).

*Summary of Comments:* Two agencies suggest that OPM remove the requirement to provide executives with written performance elements and standards on or before the beginning of the appraisal period, because the process of clearing executives' standards and elements is more time-consuming that for non-SES employees. They prefer allowing agency flexibility.

*Discussion:* Statute requires that on or before the beginning of each rating period, performance requirements for each senior executive be established in consultation with the senior executive and communicated to the senior executive. OPM agrees that the requirement that performance plans be provided in writing on or before the beginning of the appraisal period places a burden on some agencies and that agency flexibility should be provided. However, agencies are not relieved of the statutory requirement to communicate elements and standards to each senior executive on or before the beginning of the rating period.

*Change:* Language in § 431.204(i) has been modified and moved to § 430.304(d)(1), and requires that elements and standards be communicated to executives on or before the beginning of the appraisal period, and that written performance plans be provided to senior executives normally within 30 days of the beginning of the appraisal period.

43. *Issue:* Higher Level Review of Executives' Performance Plans (§ 431.204(k)).

*Summary of Comments:* Four agencies suggest that OPM remove the requirement for higher level review of executives' performance plans allowing for the employee's option to request review, or allowing agency option to provide for higher level review. Four agencies think that this review is unnecessary. Two agencies request modification of the provision to take into account situations in which the heads of major components establish the executives' performance plans.

*Discussion:* OPM agrees that there are circumstances when higher level review of performance plans for senior executives is impractical. Agencies may require this higher level review if it is desirable for them to do so. Unlike other performance appraisal systems, the SES performance appraisal system includes the Performance Review Board (PRB), which is required by statute. The PRB provides an effective means to ensure equity and fairness in the SES appraisal system.

*Change:* The requirement for higher level review of senior executive performance plans have been removed.

44 *Issue:* Performance Ratings Before a Reduction in Force (RIF) (§ 431.204(m)).

*Summary of Comments:* Two agencies object to allowing for a rating just before a RIF in the case of employees who have served only a minimum appraisal period.

*Discussion:* (See Issue 22.)

*Changes:* Section 431.204(m) has been removed. Paragraph 430.306(e) has been added, consistent with PMRS regulations, and provides that, when an agency cannot prepare a rating of record at the time specified in the plan, the executive's appraisal period shall be extended for the amount of time necessary to meet the minimum appraisal period, at which time a rating of record shall be prepared.

45. *Issue:* Minimum Appraisal Period (§ 431.204(n)).

*Summary of Comments:* Two agencies commented on the minimum appraisal period provision: one agency supports the 90-day requirement and the other prefers the flexibility provided in the PMRS regulations (a minimum appraisal period of at least 90 days but not more than 120 days).

*Discussion:* Agencies commonly have either a 90-day or a 120-day minimum appraisal period. OPM agrees that agencies should have the flexibility provided in the PMRS regulations.

*Changes:* Language in § 431.204(n) has been revised and moved to § 430.305(b). Additionally, statutory language has been added in § 430.305(a)(3) regarding the appraisal of career appointees following the beginning of a new Presidential administration.

46. *Issue:* Appraisal of Executives' Performance on Details (§ 431.204 (p) and (q)).

*Summary of Comments:* Two agencies suggest elimination of the requirement to appraise executives' performance on details, because it is difficult to anticipate the length of details, and because it presents a burden for agencies. Two agencies comment on obtaining appraisal information for executives on details outside their agencies; one thinks this should be optional, and one requests clarification on the distinction between "performance information" and "performance ratings" required for details within agencies.

*Discussion:* OPM believes that as with other employees, an executive's performance throughout the appraisal period should be considered when preparing the executive's rating of record. This includes consideration of performance for periods of time when an executive is detailed or temporarily reassigned within the same agency for the minimum appraisal period, or detailed to another agency.

*Change:* Language in § 431.204 (p) and (q) has been moved to § 430.305(d). Paragraph (d)(2), covering details outside of the employing agency, has been modified to require the employing agency to make "a reasonable effort" to obtain appraisal information from the outside organization, which shall be considered in deriving the executive's next rating of record.

47. *Issue:* Opportunity for Executives to Respond to Their Ratings (§ 431.204(r)).

*Summary of Comments:* One agency thinks higher level review should take place after the Performance Review Board (PRB) review and the final rating take place. Two agencies think this provision should be revised to take into account the situation when the agency head is the rating official.

*Discussion:* Section 4312(b)(3) of title 5 U.S.C. requires that the senior executive be provided a copy of the appraisal and rating and given an opportunity to respond in writing to the initial rating and have that rating reviewed by an employee at a higher level before the rating becomes final. Additionally, 5 U.S.C. 4314(c)(2) requires that the PRB receive the initial rating, and any response to it by the senior executive. These provisions make it clear that the requirement for higher level review occurs prior to the review by the PRB. OPM agrees that this provision should take into account the situation when the head of the agency is the rating official.

*Change:* This provision is moved to § 430.306(a), and the language "unless there is no higher level" is added to take into account the situation when the agency head is the rating official.

48. *Issue:* Federal Register Notice of Appointments to a PRB (§ 431.204(s)).

*Summary of Comments:* One agency prefers to continue publishing in the Federal Register a roster from which PRB appointments may be made.

*Discussion:* The statute (5 U.S.C. 4314(c)(4)) provides that members of performance review boards shall be appointed in such a manner as to assure consistency, stability, and objectivity in performance appraisal. It further states that notice of the appointment of an individual to serve as a member shall be published in the Federal Register.

*Change:* No change. This provision has been moved to § 430.307(b).

49. *Issue:* Requirement for a Written Recommendation for an Award for Each Executive Rated "Outstanding" (§ 431.204(w)).

*Summary of Comments:* Nine agencies object to the provision requiring a written recommendation for an award for each executive rated "Outstanding". Five of those agencies object to the increased paperwork, and offer several suggestions: make the award automatic or optional; require the rating official to recommend the award when recommending the "Outstanding" rating. Four agencies think that the provision requires awards, and think mandating awards is too restrictive on agencies.

*Discussion:* References to awards for senior executives more appropriately belong in other parts of the Code of Federal Regulations. Provisions for SES performance awards are found in 5 U.S.C. 5384 and rank awards are covered in 5 U.S.C. 4507 (see also Issue 27).

*Change:* The requirement for a written recommendation for an award for a senior executive is removed.

50. *Issue:* General Comments on Special Awards and Definitions (Part 451 and § 451.204).

*Summary of Comments:* Four agencies think that OPM should clarify the differences between Performance Awards (Part 531, Subpart F of the proposed regulations) and Special Awards.

Two agencies think that OPM should make the regulations on cash awards consistent for all populations covered. One agency believes that the heading of Part 451 should be changed. Four agencies think that, generally, the definitions in the special awards regulations are unclear. Five agencies request clarification of "meritorious action"; four agencies question "special act or service"; five agencies express difficulty with the definitions of "non-monetary award" and "honorary award"; and two agencies request a clearer definition of "contribution". One agency suggests adding a definition of "monetary award" which would be consistent with the definiton of that term under the Performance Awards regulations proposed for Part 531, Subpart F. One agency suggests additional language to indicate the type of award to be used for work on special task forces.

*Discussion:* OPM agrees with agencies that clarification is needed in this part and that a great deal of the confusion exists in the terminology in the awards program can be eliminated by establishing regulatory provisions and terminology which are consistent with the statutory bases in 5 U.S.C. Chapter 45 (Incentive Awards) and in 5 U.S.C. 5407.

OPM agrees that clarification is necessary to distinguish among the forms of recognition available for overall performance based on a current rating or record and those available for superior accomplishments, either within or outside of job requirements. Further, OPM agrees that cash awards regulations should be consistent for all populations.

*Changes:* To bring this part in line with its statutory authority, Part 451 is titled "Incentive Awards". A new Subpart A is titled "Agency Superior Accomplishment Awards". To make a clear distinction between performance awards for overall performance based on a current rating of record and awards under this part, performance awards provisions have been moved to Part 430, Subpart E. Additionally, a new Subpart B in Part 451 incorporates Presidential Awards to support the distinction made in statute between awards made by agencies and awards made by the President. Subpart C is reserved for Productivity Gainsharing Programs regulations.

Within Subpart A, definitions have been rewritten to clarify the types of accomplishments which can be recognized with agency Superior Accomplishment Awards. Definitions for "honorary award" and "meritorious action" have been removed. "Special act or service" has been redefined to include superior contributions or accomplishments either within or outside of the scope of the employee's job. The definition of "tangible savings" has been expanded to include accomplishments which result in dollar benefits (such as increased revenues) as well as dollar savings.

51. *Issue:* Awards Scale for Tangible Savings (§ 451.204).

*Summary of Comments:* Thirteen of the 29 agencies commenting on the proposed PMS regulations object to the awards scale for tangible savings. Two of those agencies think that the awards scale should remain in guidance.

Twelve of the agencies object to the reduction in amounts available to reward people who have saved money for the Government. Seven agencies think that this sends a negative message to employees at a time when the Government is emphasizing pay-for-performance, productivity and cost-savings.

One agency suggests eliminating the language in § 451.204(d) to "limit the use of monetary awards", because it is inconsistent with the intent of the Special Awards regulations.

*Discussion:* OPM agrees that the awards scale for contributions resulting in tangible benefits more appropriately belongs in guidance. This allows agency flexibility in establishing the amounts of awards for contributions resulting in dollar savings, particularly under appropriate special circumstances.

OPM agrees with agency comments that awards scales should not be reduced. The awards scale previously contained in guidance was comparable with awards practices in the private sector. OPM agrees that a reduction in the amount an employee receives for his or her efforts which save the Government money, or any limit on the use of monetary awards, would have an adverse impact, and would be inconsistent with the program's intended purpose.

*Change:* The awards scales for tangible benefits, awards over $10,000 and Presidential Awards contained in § 451.205(c) have been removed. The awards scales contained in FPM Chapter 451 will be retained and serve as a guide to agencies in establishing internal awards scales for contributions resulting in tangible and/or intangible benefits.

52. *Issue:* Agency Responsibilities (§ 451.209).

*Summary of Comments:* One agency disagrees with using the receipt of an award as a ranking factor in making promotions. The agency believes that it may not be valid in view of the Uniform Guidelines on Employee Selection Procedures, and that the use of such a ranking factor should be left to the agency's discretion.

One agency suggests adding a provision requiring that employees be informed of the availability of awards.

*Discussion:* Statutory provisions (5 U.S.C. 3362) require that receipt of an award be a factor in ranking and selecting employees who otherwise meet the requirements for promotion.

OPM agrees that provision should be made to inform employees at all levels about the program and how they can earn awards. Additionally, employees should be informed why other employees receive awards.

*Change:* Provisions have been added in § 451.104(i) to require that appropriate training and information be provided to supervisors and employees on the award program.

53. *Issue:* Acceptable Level of Competence (ALOC) Determination for Within-Grade Increases (§§ 531.403 and 531.404).

*Summary of Comments:* Four agencies and one labor organization comment on the definition of ALOC used in granting

within-grade increases (WGI's). Three agencies support the requirement for a "Fully Successful" rating for an ALOC determination. Two of those agencies and one labor organization object to requiring a "Fully Successful" rating on all critical elements for performance to be determined at an ALOC. They prefer that the ALOC determination be based on the summary rating. Further, they believe agencies should have the option to rate an employee "Minimally Successful" on one element, while giving him or her a "Fully Successful" summary rating. One agency and one labor organization note that there is no comparable requirement for determining PMRS employees' merit increases. One agency points out that the definitions of ALOC were inconsistent, referring in instance to performance in the assigned position.

*Discussion:* OPM agrees that the definitions for ALOC should be consistent. OPM also agrees that the requirements for determining WGI's for GS employees should be parallel with the requirements for determining merit increases for PMRS employees, in that an ALOC determination should be based only on a summary rating of "Fully Successful".

*Changes:* To be consistent, the provisions on Acceptable Level of Competence in §§ 531.403 and 531.404 both refer to an employee's performance of the duties and responsibilities of his or her assigned position. The requirement for a "Fully Successful" rating on each critical element has been deleted; an employee can be determined to be at an Acceptable Level of Competence based on a current rating of record of at least "Fully Successful".

To reflect a change in definitions in Part 430, the term "rating of record" has been substituted for "summary rating". An additional provision on using current ratings of record for ALOC purposes has been added at § 531.404(a)(2) to parallel PMRS regulations. Also, a provision formerly included in Part 430, requiring a more current rating of record when an ALOC determination is inconsistent with the current rating of record, has been moved to § 531.404(a)(1); (see also Issue 24 "Performance Rating for a Within-Grade Increase").

54. *Issue:* Delay in ALOC Determinations for Granting Within-Grade Increases (WGI's) (Erroneously designated § 531.408).

Grade Increases (WGI's) (Erroneously designated § 531.408).

Note.—Due to a typesetting error, this material was misnumbered, and the revisions to § 531.408 were omitted. A correction notice, including the omitted material, was published October 7, 1985 at 50 FR 40865, for a 30-day comment period. OPM has received no comments on that portion of the regulations.

*Summary of Comments:* Four agencies object to delaying ALOC determinations and WGI's through no fault of the employees. Three of these agencies recommend that any such delayed within-grade increases be granted retroactively to the eligibility date. The fourth agency recommends that such employees be granted a within-grade increase based on a previous rating of record or a presumed "Fully Successful" rating. One agency recommends that OPM add Intergovernmental Personnel Act (IPA) assignments as a reason for waiving an ALOC determination and granting a within-grade increase. Several additional comments request clarification of the regulations and a closer linkage between these regulations and the PMRS regulations.

*Discussion:* It has always been the intent that, if an employee's ALOC determination is delayed because he or she has not been provided with performance requirements and also has not been rated within 90 days of the ALOC determination (both circumstances beyond his or her control), the employee would receive a WGI, if approved, retroactively to the eligibility date. It is OPM's intention that an up-to-date performance rating be used wherever possible in making an ALOC determination. This can be done in most cases by extending the appraisal period until the minimum appraisal period has been served under performance requirements, rating the employee, making the ALOC determination, and granting the WGI retroactively if warranted. An IPA assignment is currently covered for ALOC determination in § 531.406(c)(1)(v), so no change is necessary in these regulations.

*Changes:* Section 531.409(c)(2) has been amended to clarify that a within-grade increase based on a delayed ALOC determination will be granted retroactively to the eligibility date. Editorial changes have been made to § 531.409(d) to clarify the reasons for waiver of an ALOC determination.

55. *Issue:* Continuing Evaluation After Withholding a WGI (§ 531.411).

*Summary of Comments:* One agency indicates that employees who are denied a WGI should be rated again after no less than the minimum appraisal period and no more than 52 calendar weeks. This agency also recommends that an employee's right to appeal a within-grade denial should be eliminated.

*Discussion:* OPM believes that agencies should have flexibility to determine the time required for an employee to demonstrate sustained performance at an acceptable level of competence. However, fairness dictates that the employee's performance should be reevaluated after no more than 1 year. The right to appeal the denial of a WGI is a statutory right of all employees which cannot be denied by regulation.

*Change:* No change.

56. *Issue:* Level of Performance Required for Quality Step Increase (QSI) (§ 531.504).

*Summary of Comments:* Three agencies agree that QSI's should only be granted to employees who receive a performance rating of "Outstanding". Four agencies feel that limiting QSI's only to employees rated "Outstanding" is too restrictive, and would lead to inflated ratings, a reduction in the number of QSI's granted, and an inability to reward adequately employees rated "Exceeds Fully Successful" who substantially exceed performance standards on a continuing basis.

*Discussion:* Pay-for-performance dictates that the QSI should be granted only to employees with the highest quality performance because it constitutes an increase to base pay, the value of which continues over many years. Employees rated "Exceeds Fully Successful" can be rewarded through the agencies' authority to grant one-time performance awards.

*Change:* No change.

57. *Issue:* Effective Date of Quality Step Increases (§ 531.506).

*Summary of Comments:* One agency agrees with the provision to grant QSI's as soon as practicable after the performance rating to reinforce superior performance. Three agencies prefer greater flexibility in the granting of QSI's: to grant QSI's at any time during the appraisal period, as performance awards are granted; or to adjust timing of QSI's for employees in steps four and seven of the grade, so that within-grade increase waiting periods would not be prolonged; or to grant QSI's once each year in conjunction with performance awards. One agency thinks that QSI's should be granted within 60 days of the rating of record.

*Discussion:* OPM believes there must be a firm connection between exemplary performance and its rewards. The closer in time the reward is given for the "Outstanding" performance that triggers the reward, the more meaningful the reward. A QSI should be made as soon as practicable after a rating of record is approved. However, OPM also

believes each agency should have the flexibility to meet unusual requirements in the timing of QSI's in certain instances. The regulations provide sufficient flexibility so that an agency can ensure that the receipt of a QSI will not prolong the waiting period for a future WGI.

*Changes:* No change.

58. *Issue:* Agency Plans for Granting QSI's (§ 531.507).

*Summary of Comments:* One agency thinks that the requirements to develop a plan for QSI's and to inform all employees annually of the numbers of QSI's granted is an unwarranted administrative burden. Two other agencies disagree with the requirement that employees be informed of the number of QSI's granted each year by grade level, and think that the requirement should be eliminated or changed to require informing employees of only the total number of QSI's. One agency recommends addition of a provision requiring that guidance and training on QSI's be given to managers and supervisors.

*Discussion:* OPM believes that the QSI is an integral part of the pay-for-performance system for GS employees, and, therefore, a plan for awarding QSI's must be included as part of an *integral* Performance Management Plan. OPM also agrees that training on the appropriate use of the QSI should be an integral part of total training on the Performance Management System and Plan. E.O. 11721 requires that agencies report annually to employees the number of QSI's granted in the agency. To ensure employee perception of equity in the distribution of QSI's, OPM believes that it is essential that the report include not only the total number but also the distribution by grade level of QSI's in the agency.

*Change:* A new § 531.507(e) requires agency QSI plans to provide training and evaluation on the use of QSI's.

59. *Issue:* General Comments on Part 531, Subpart F, and Definitions (§ 531.604).

*Summary of Comments:* Two agencies believe that the performance awards provisions should be moved from Part 531 to another part Title 5, CFR, because awards are not additions to basic pay. These agencies think that Part 531 should only include pay-setting regulations.

Two agencies suggest that, to preclude confusion and maintain consistency for supervisors and employees, performance and cash awards programs should be as consistent and equitable as possible for both populations. One agency requests clarification of the distinction between special act or service awards as contained in this subpart, versus the same awards as contained in Part 451.

One agency suggests expanding definitions of the types of awards to make clearer distinctions between them. Two agencies ask for clarification of language in the definitions such as "monetary connotation for the agency but not for the employee", contained in the definition of "non-monetary award".

*Discussion:* OPM agrees that there should be consistency and equity between performance and cash awards programs for supervisors and employees. OPM further agrees that clarification in terminology is needed to clearly distinguish between awards based on overall performance (rating of record) and those based on superior accomplishments. Such a distinction will reduce existing confusion surrounding awards programs and assist agencies in administering programs. OPM concurs that performance awards provisions are inappropriately placed in Part 531 because these awards are not increases to basic pay.

*Change:* Part 531, Subpart F has been moved to Part 430, Subpart E and has been significantly revised to parallel, as consistently as possible, the provisions for performance awards for the PMRS. (Note: As indicated above, some of the changes to parallel the performance awards systems suggested by commenters are substantially different from the proposed rules. OPM agrees with the changes, and is proposing them at § 430.504 for comment elsewhere in today's daily issue. Therefore, § 430.504 is *reserved* in these final regulations.)

The changes in these final regulations result in the elimination of unclear or confusing definitions in the proposed regulations and facilitate a clear distinction between performance awards and superior accomplishment awards (cash awards) covered under Part 451, Subpart A (see also Issue 50). Additionally, because performance awards are moved to Part 430, the Part 532 provisions for performance awards for Prevailing Rate employees are removed as prevailing rate employees are covered under Part 430.

60. *Issue:* Agency Responsibilities (§ 531.609).

*Summary of Comments:* One agency objects to including a performance award component in agency Performance Management Plans, and objects to submitting the plan to OPM for review and approval. One agency agrees and one agency disagrees with the requirement that performance awards be considered as selective factors for merit promotions.

*Discussion:* Performance awards are an integral part of the PMS. In line with PMRS requirements for development of a comprehensive plan to administer all components of the system, plans for each component (performance appraisal, performance awards, pay, and superior accomplishment awards) must be submitted to OPM for review and approval.

Title 5, U.S.C., section 3362 requires that awards be a factor in ranking and selecting employees who otherwise meet the requirements for promotion.

*Change:* No change. (Agency responsibilities moved to § 430.506.)

61. *Issue:* Part 771—Agency Administrative Grievance System.

*Summary of Comments:* None.

*Discussion:* See Issue 25—"Reconsideration of a Performance Rating".

*Changes:* Section 771.206(c)(3) has been deleted (see change in Issue 25). Additionally, § 771.206(c)(1)(x) has been modified to make a technical correction by including the amount of an award under matters excluded.

62. *Issue:* Implementation Schedule (§§ 430.208 and 431.301).

*Summary of Comments:* Nineteen agencies and one labor organization object to the proposed implementation schedule for Performance Management Plans under the PMS as being too short and unrealistic. Some of the reasons include:

—Insufficient time to consult with labor organizations, make changes, and train employees;

—Limited resources;

—Logistical problems in large organizations;

—Continuing involvement with implementing the new PMRS, and

—Difficulty implementing in the middle of performance appraisal cycles.

Agencies recommend several alternatives, including:

—Implementation at the beginning of the agency's next appraisal cycle;

—Implementation by October 1, 1986;

—Submission of plans to OPM by July 1, 1986; and

—Deadlines expressed in terms of time after publication of the final regulations.

One labor organization recommends that OPM use a staggered 3-year schedule for submission and implementation of plans, as provided in the final regulations published in October 1983.

*Discussion:* OPM intends to implement the PMS as soon as feasible, to eliminate any unnecessary differences among SES, Prevailing Rate, GS, and PMRS employees. OPM is

aware that agencies must be given adequate time to develop sound Performance Management Plans and to train employees, and experience with implementing PMRS has shown this process to be time consuming. However, experience developing PMRS plans should assist agencies and consiJerably shorten the time needed to develop plans and train employees.

In order to cause as little disruption as possible in agency performance appraisal cycles, OPM agrees that revised performance appraisal requirements should be implemented at the beginning of the employees' next performance appraisal cycle, rather than in mid-cycle. Because the plan submission and implementation dates have been significantly extended in the final regulations, and because OPM intends to eliminate as much as possible any disparity among systems, implementation staggered by grade levels is no longer needed.

*Changes:* As indicated in the "DATES" section above, agencies must submit their Performance Management Plans to OPM 90 days after the date of publication of these regulations. Generally, OPM will approve the Plans within 90 days after the Plans are received by OPM.

Agencies' Performance Management Plans must be implemented no later than 90 days after the date of OPM approval. At that time, all provisions of these regulations become applicable, except the new performance appraisal provisions. The performance appraisal provisions become applicable to each employee at the beginning of his or her next appraisal cycle after OPM approval of the Performance Management Plan.

For the purposes of taking performance-based personnel actions, including reassignment, reduction in grade or removal under 5 U.S.C. 4303, the agency's current performance appraisal plans remain in effect until OPM approves the performance appraisal parts of the new PMS Performance Management Plan, and those parts are implemented on the schedule outlined below.

Agencies must implement their Plans as specified above except where provisions of an existing negotiated agreement are in explicit conflict with these PMS regulations, in which case the provisions of the negotiated agreement will remain in effect until its expiration. Agencies may request OPM approval of the following exceptions:

1. For specific provisions of OPM regulations that are not in explicit conflict with existing provisions of a labor agreement, but would cause significant inequities if implemented in combination with provisions of the labor agreement; or

2. Where apparently conflicting provisions of negotiated agreements are consistent with the intent of OPM regulations.

For the convenience of agencies in application of the new regulations, following is the schedule for application of the PMS regulations.

Part 430 Subpart A—30 days after the date of publication.

Parts 293, 300, 335, Subpart E of Part 430,* Subparts D and E of Part 531, and Part 771—90 days after plan approval.

Subparts B and C of Part 430—At the beginning of the employee's next performance appraisal cycle.

**E.O. 12291, Federal Regulation**

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Government employees.

**List of Subjects**

*5 CFR Part 293*

Archives and records, Government employees, Privacy.

*5 CFR Part 300*

Administrative practice and procedure, Government employees.

*5 CFR Part 335*

Government employees.

*5 CFR Part 430*

Administrative practice and procedure, Decorations, Medals, Awards, Government employees.

*5 CFR Part 451*

Decorations, Medals, Awards, Government employees.

*5 CFR Part 531*

Administrative practice and procedure, Government employees, Wages.

*5 CFR Part 532*

Administrative practice and procedure, Government employees, Wages.

*5 CFR Part 771*

Administrative practice and procedure, Government employees.

*Pending final rulemaking on § 430.504, OPM may extend the implementation date for the performance awards component of the Performance Management Plan.

U.S. Office of Personnel Management.
**Constance Horner,**
*Director.*

Accordingly, the Office of Personnel Management is amending Title 5, Code of Federal Regulations, as follows:

## PART 293—Personnel Records

1. The Authority citation for Part 293 is revised to read as follows:

**Authority:** 5 U.S.C. 552, 4362a, and 4315; E.O. 12107 (December 28, 1978); 3 CFR 1954–1958 Comp.; 5 U.S.C. 1103, 1104 and 1302; 5 CFR 7.2; E.O. 9830; 3 CFR 1943–1948 Comp.

2. In Subpart D, § 293.402(a) and (b) are revised to read as follows:

### Subpart D—Employee Performance File System Records

* * * * *

**§ 293.402 Establishment of separate employee performance record system.**

(a) Copies of employees' performance ratings of record, including the performance plans on which the ratings are based, must be placed in either the employee's Official Personnel Folder (OPF) or in the Employee Performance File (EPF). However, other performance-related documents may be retained in the OPF only when the agency prescribes the use of a separate envelope, temporarily located in the OPF, and removed whenever the OPF (except as required in § 293.404(b)) is transferred to another agency. Performance ratings of record, including the performance plans on which the ratings are based, shall be retained on the left (temporary) side of the OPF. No other performance-related record shall be retained on the left (temporary) or right (long term) side of the OPF or shall be transferred to the National Personnel Records Center (except as required by § 293.404(b)).

(b) Except for performance records maintained in the OPF consistent with paragraph (a) of this section, each agency having employees occupying a position described in § 293.401 shall provide for maintenance of performance-related records for such employees in this EPF system. The agency may elect to retain records in a separate file that is located in the same office with the OPF, or in an envelope kept in the OPF itself. If the agency determines that a separate EPF is cost-effective, such a file may be located in another designated agency office (as specified in the agency's performance appraisal plan) including with supervisors or managers (hereinafter referred to as rating officials) or with

Performance Review Boards. Any supporting documents that the agency may prescribe as necessary for agency officials in performance of their duties shall be kept in these files.

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3. Sections 294 404(a)(1) and (a)(2) are revised to read as follows:

**§ 293.404 Retention schedule.**

(a)(1) Except as provided in § 293.405(a), performance ratings or documents supporting them are generally not permanent records and shall, except for appointees to the SES and including incumbents of executive positions not covered by the SES, be retained as prescribed below:

(i) Performance ratings of record, including the performance plans on which they are based, shall be retained for 3 years;

(ii) Supporting documents shall be retained for as long as the agency deems appropriate (up to 3 years);

(iii) Performance records superseded (e.g., through an administrative or judicial procedure) and performance-related records pertaining to a former employee (except as prescribed in § 293.405(a)) need not be retained for a minimum of 3 years. Rather, in the former case they are to be destroyed and in the latter case agencies shall determine the retention schedule; and

(iv) Except where prohibited by law, retention of automated records longer than the maximum prescribed here is permitted for purposes of statistical analysis so long as the data are not used in any action affecting the employee when the manual record has been or should have been destroyed.

(2) When an employee is reassigned within the employing agency, disposition of records in this system, including transfer with the employee who changes positions, shall be as agencies prescribe and consistent with § 293.405(a).

• • • • •

4. Section 293.405(a) is revised to read as follows:

**§ 293.405 Disposition of records.**

(a) When the OPF of a non-SES employee is sent to another servicing office in the employing agency, to another agency, or to the National Personnel Records Center, the "losing" servicing office shall include in the OPF all performance ratings of record that are 3 years old or less, including the performance plan on which the most recent rating was based, and the summary rating prepared when the employee changes positions, as prescribed in Part 430 of this chapter. Also, the "losing" office will purge from the OPF all performance ratings and performance plans that are more than 3 years old, and other performance-related records, according to agency policy established under § 293.404(a)(2) and in accordance with FPM Supplement 293–31.

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## PART 300—EMPLOYMENT (GENERAL)

5. The authority citation for Part 300 is revised to read as follows:

Authority: 5 U.S.C. secs. 552, 3301, 3302, E.O. 10577, 3 CFR, 1954–1958 Comp., page 218, unless otherwise noted. Secs. 300.101–300.104 also issued under 5 U.S.C. secs. 7151, 7154, E.O. 11478, 3 CFR, 1966–1970 Comp., page 803, unless otherwise noted.

6. Section 300.602 is revised to read as follows:

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### Subpart F—Time-in-Grade Restrictions

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**§ 300.602 Restrictions.**

The time-in-grade restrictions in this subpart are subject to the eligibility requirements based on performance in § 335.104 of this chapter.

(a) *Advancement to positions at GS–12 and above.* An agency may advance an employee to a position at GS–12 or above only after he or she has served a minimum of 1 year in the next lower grade.

(b) *Advancement to positions at GS–6 through GS–11.* An agency may advance an employee to a position at GS–6 through GS–11 only after he or she has served a minimum of —

(1) One year in a position two grades lower, when the position to which he or she is advanced is in a line of work properly classified at two-grade intervals; or

(2) One year at the next lower grade when the position to which he or she is advanced is in a line of work properly classified at one-grade intervals.

(c) *Advancement to positions at GS–5 or below.* An agency may advance an employee to a position at GS–5 or below which is not more than two grades above the lowest grade he or she held within the preceding year under a nontemporary appointment.

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## PART 335—PROMOTION AND INTERNAL PLACEMENT

7. The authority citation for Part 335 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302, E.O. 10577; 3 CFR 1954–1958 Comp. page 218.

8. Section 335.104 is revised to read as follows:

### Subpart A—General Provisions

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**§ 335.104 Eligibility for career ladder promotion.**

No employee shall receive a career ladder promotion unless his or her current rating of record under Part 430 of this chapter is "Fully Successful" (level 3) or higher. In addition, no employee may receive a career ladder promotion who has a rating below "Fully Successful" on a critical element that is also critical to performance at the next higher grade of the career ladder.

## PART 430—PERFORMANCE MANAGEMENT

9. The authority citation for Part 430 is revised to read as follows, and the authority for Subpart D is removed.

Authority: 5 U.S.C. chapters 43, 45, 53, and 54.

10. Subpart A is added to Part 430 to read as follows:

### Subpart A—Performance Management System

Sec.
430.101 Authority.
430.102 Performance management.
430.103 Performance Management Plans.

### Subpart A—Performance Management System

**§ 430.101 Authority.**

Chapters 43, 45, 53, and 54 of title 5, U.S. Code, provide for performance appraisal, awards, pay, and the Performance Management and Recognition System for Federal employees. This subpart supplements and implements those portions of the law as well as Parts 451, 531, and 540 of this chapter.

**§ 430.102 Performance management.**

Performance management is the systematic process by which an agency integrates performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals.

**§ 430.103 Performance Management Plans.**

(a)(1) A Performance Management Plan is the description of an agency's system for implementing all aspects of performance management.

(2) OPM will provide checklists for Performance Management Plans or parts of plans containing all the components necessary for approval of a plan or part of a plan.

(b) Agencies must submit all parts of proposed Performance Management Plans to OPM for review and approval. If major subcomponents of an agency propose to modify an element of the agency's system that is included in the Performance Management Plan Checklist, or to develop a separate system based on agency guidelines, each such subcomponent's proposed plan must be reviewed and approved by the agency and submitted to OPM for final approval. Performance Management Plans shall include each of the following which is applicable to the agency and any additional information requested by OPM:

(1) Performance appraisal systems plans required under 5 U.S.C. 4302, 4302a, and 4312 and Subparts B, C, and D of this part.

(2) Performance Management and Recognition System (PMRS) plans required under Part 540 of this chapter.

(3) Performance awards plans required under Subpart E of this part, including the agency's method for funding and payment of performance awards and the method for determining projected expenditures.

(4) Superior Accomplishment Awards plans required under Part 451, Subpart A.

(5) Productivity Gainsharing Program plans required under Part 451, Subpart C.

(6) Plans for determining and distributing within-grade increases under Part 531, Subpart D of this chapter; and

(7) Plans for awarding quality step increases under Part 531, Subpart E of this chapter.

(c) Agencies shall submit to OPM for review and approval any changes to their Performance Management Plans that modify any element of the agency's system that is included in a Performance Management Plan Checklist.

(d) Each agency shall maintain records and submit reports required by OPM regarding the operation of an agency Performance Management System or any part of a plan.

11. Subpart B of Part 430 is revised to read as follows:

**Subpart B—Performance Appraisal for General Schedule and Prevailing Rate Employees**

Sec.

430.201 General.
430.202 Coverage.
430.203 Definitions.
430.204 Agency performance appraisal systems.
430.205 Appraisal of performance.
430.206 Ratings.
430.207 Performance appraisal advisory committees. [Reserved]
430.208 Training and evaluation.
430.209 OPM review of performance appraisal systems.
430.210 Performance appraisal plans.

**Subpart B—Performance Appraisal for General Schedule and Prevailing Rate Employees**

**§ 430.201 General.**

(a) *Statutory authority.* Chapter 43 of title 5, United States Code (5 U.S.C. 4301–4305) provides for the establishment of agency performance appraisal systems and for appraisal of employees. This subpart contains regulations which the Office of Personnel Management (OPM) has prescribed for Performance Appraisal Systems for General Schedule and prevailing rate employees, and implements and supplements the provisions of 5 U.S.C. 4301–4305.

(b) *Purpose.* It is the purpose of this subpart to ensure that performance appraisal systems for employees are used as a tool for executing basic management and supervisory responsibilities by—

(1) Communicating and clarifying agency goals and objectives;

(2) Identifying individual accountability for the accomplishment of organizational goals and objectives;

(3) Evaluating and improving individual and organizational accomplishments; and

(4) Using the results of performance appraisal as a basis for adjusting basic pay and determining performance awards, training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

**§ 430.202 Coverage.**

(a) *Employees and agencies covered by statute.* (1) Section 4301(a) of title 5, United States Code, lists agencies covered by this subpart.

(2) Section 4301(2) of title 5, United States Code, lists employees covered by statute by this subpart. However, employees covered by the PMRS are not covered by this subpart.

(b) *Statutory exclusions.* This subpart does not apply to agencies or employees excluded by 5 U.S.C. 4301 (1) and (2), the United States Postal Service and the Postal Rate Commission, or to employees covered by the PMRS consistent with 5 U.S.C. 4302a and 5 U.S.C. 5402.

(c) *Administrative exclusions.* OPM may exclude any position or group of positions in the excepted service under the authority of 5 U.S.C. 4301(2)(G). The following are excluded:

(1) Positions for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12-month period.

(2) Positions filled by noncareer executive assignments under Part 305 of this chapter.

(d) *Agency requests for exclusions.* Heads of agencies or their designees may request the Director of the Office of Personnel Management to exclude positions in the excepted service. The request must be in writing, explaining why the exclusion would be in the interest of good administration.

**§ 430.203 Definitions.**

In this subpart, terms are defined as follows—

"Appraisal" means the act or process of reviewing and evaluating the performance of an employee against the described performance standard(s).

"Appraisal period" means the period of time established by an appraisal system for which an employee's performance will be reviewed.

"Appraisal system" means a performance appraisal system established by an agency or component of an agency under subchapter I of chapter 43 of title 5, U.S.C. and this subpart which provides for identification of critical and non-critical elements, establishment of performance standards, communication of elements and standards to employees, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

"Critical element" means a component of a position consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that unacceptable performance on the element would result in unacceptable performance in the position.

"Non-critical element" means a component of an employee's position which does not meet the definition of a critical element, but is of sufficient importance to warrant written appraisal. Non-critical elements are optional and may be used at agency discretion.

"Performance" means an employee's accomplishment of assigned work as specified in the critical and non-critical elements of the employee's position.

"Performance Appraisal System": see Appraisal system.

"Performance Management Plan" means the description of the agency's methods which integrate performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals. The Performance Management Plan, which includes the performance appraisal plan, must be submitted to OPM for review and approval as required by Subpart A of this part.

"Performance plan" means the aggregation of all of an employee's written critical and non-critical elements and performance standards).

"Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance.

"Progress review" means a review of the employee's progress toward achieving the performance standards and is not in itself a rating.

"Rating": see Summary rating.

"Rating of record" means the summary rating required at the time specified in the Performance Management Plan or at such other times as the Plan specifies for special circumstances.

"Summary rating" means the written record of the appraisal of each critical and non-critical element and the assignment of a summary rating level (as specified in § 430.204 (g) and (h) of this subpart).

**§ 430.204 Agency performance appraisal systems.**

(a) Each agency shall develop one or more performance appraisal systems for employees covered by this subpart.

(b) Under each appraisal system, critical elements must be included and non-critical elements may be included in individual performance plans. An employee must be appraised on each critical and non-critical element in the employee's performance plan, unless the employee has had insufficient opportunity to demonstrate performance on the element. A summary rating level, as specified in paragraph (h) of this section, must be assigned.

(c) Each appraisal system shall encourage employee participation in establishing performance plans. This may be accomplished by means including, but not limited to, the following:

(1) Employee and supervisor discuss and develop performance plan together;

(2) Employee provides to supervisor a draft performance plan;

(3) Employee comments on draft performance plan prepared by supervisor; and

(4) Performance plan is prepared by a group of employees occupying similar positions, with supervisor's approval.

Final authority for establishing such plans rests with the supervising officials.

(d) (1) Each appraisal system shall provide for establishing performance elements and standards based on the requirements of the employee's positions, providing written performance plans to employees at the beginning of each appraisal period (normally within 30 days), and appraising employees based on a comparison of performance with the standards established for the appraisal period.

(2) Accomplishment of organizational objectives should, when appropriate, be included in performance plans by incorporating objectives, goals, program plans, work plans, or by other similar means that account for program results.

(e) Each appraisal system shall provide for a minimum of three rating levels for each critical element. Performance standards must be written at the "Fully Successful" level for all critical and non-critical elements and may be written at other levels. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level.

(f) Each appraisal system shall provide that performance plans shall be in writing and shall be reviewed and approved at the beginning of the appraisal period by a person at a higher level in the organization than that of the appraising official. Agencies may describe exceptions to higher level review and approval of performance plans in their Performance Management Plans.

(g) Each appraisal system shall include a method for deriving a summary rating level from performance appraisals of critical elements and, at agency discretion, appraisals of non-critical elements. If appraisals of non-critical elements are considered in deriving summary rating levels, the derivation method must show that more weight will be given to critical elements than non-critical elements.

(h) Each appraisal system shall provide for five summary rating levels. The rating levels must include an "Unacceptable" level, a level between "Unacceptable" and "Fully Successful", a "Fully Successful" level, and two levels which are above "Fully Successful." For purposes of this part, "Unacceptable" is referred to as level 1, the level between "Unacceptable" and "Fully Successful" is level 2, "Fully Successful" is level 3, the level one level above "Fully Successful" is level 4, and the level two levels above "Fully Successful" is level 5.

(i) Each appraisal system shall provide for assisting employees in improving performance rated at a level below the "Fully Successful" level. Such assistance may include but is not limited to formal training, on-the-job training, counseling, and closer supervision.

(j) Except with respect to employees occupying positions in Schedule C as authorized by § 231.3301 of this chapter—

(1) Each appraisal system shall provide for reassigning, reducing in grade, or removing any employee whose performance is "Unacceptable", but only after affording the employee a reasonable opportunity to demonstrate acceptable performance, as required by 5 U.S.C. 4302(b)(6).

(2) At the time that an agency identifies the critical element(s) for which performance is "Unacceptable", the employee must be informed of the performance standards that must be reached in order to be retained.

(3) If, at the conclusion of the opportunity period referred to in paragraph (j)(1) of this section, the employee's performance continues to be "Unacceptable", the agency must initiate reassignment, reduction in grade, or removal, subject to the provisions of 5 U.S.C. 4303.

(k) When an employee's position under any Federal pay system is converted to a pay system covered by this subpart, and when there is no change of duties and responsibilities, the employee's rating of record will be considered to have been derived under 5 U.S.C. 4302 and from the position which the employee now occupies.

**§ 430.205 Appraisal of performance.**

(a) *Appraisal period.* Each agency appraisal system shall establish an official appraisal period for which a rating of record shall be prepared. Employees shall generally be given a rating of record on an annual basis. Agencies may provide for longer appraisal periods when duties and responsibilities of a position or the tour of duty of a position so warrant. Systems shall provide for preparing a summary rating when an employee changes positions during the appraisal period, if the employee has served for the minimum appraisal period in the position from which he/she has

changed; agency Performance Management Plans must describe how these ratings and any other ratings given throughout the appraisal period will be taken into consideration in deriving the next rating of record.

(b) *Minimum appraisal period.* Agency appraisal systems shall establish a minimum appraisal period of at least 90 days but not more than 120 days.

(c) Appraisal of each element. An employee must be appraised on each critical and non-critical element in the employee's performance plan, unless the employee has had insufficient opportunity to demonstrate performance on the element.

(d) *Appraisal of performance on details.* (1) When employees are detailed or temporarily promoted within the same agency, and the detail or temporary promotion is expected to last 120 days or longer, agencies shall provide written critical elements and performance standards to employees as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary promotion. Ratings on critical elements must be prepared for these details and temporary promotions and must be considered in deriving an employee's next rating of record.

(2) When employees are detailed outside of the agency, the employing agency must make a reasonable effort to obtain appraisal information from the outside organization, which shall be considered in deriving the employee's next rating of record.

(i) If an employee has served in the employing agency for the minimum appraisal period, the employee must be rated. The rating shall take into consideration appraisal information obtained from the borrowing organization.

(ii) If an employee has not served in the agency for the established minimum appraisal period, but has served for the minimum appraisal period outside the employing agency, the employing agency must make a reasonable effort to prepare a rating based on a performance plan obtained from the borrowing organization.

(e) *Progress review.* A progress review shall be held for each employee at least once during the appraisal period. At a minimum, employees shall be informed of their level of performance by comparision with the performance elements and standards established for their positions.

(f) *Appraising disabled veterans.* The performance appraisal and resulting rating of a disabled veteran may not be lowered because the veteran has been absent from work to seek medical treatment as provided in Executive Order 5396.

**§ 430.206 Ratings.**

(a) *Written rating.* A written rating of record must be given to each employee as soon as practicable after the end of the appraisal period.

(b) *Appraisal of each critical and non-critical element.* Employees must be appraised on each critical element and non-critical element of the performance plan(s) on which the employee has had a chance to perform.

(c) *Higher level review.* Ratings of record and preformance-based personnel actions shall be reviewed and approved by a person(s) at a higher level in the organization than that of the appraising official. Ratings of record may not be communicated to employees prior to approval by the final reviewer. This does not preclude communication about appraisal of performance between a supervisor and an employee prior to the determination of the rating of record. Ratings of record must be approved by the official with the responsibility for managing the performance awards budget within the agency. Agencies may describe exceptions to higher level approval of ratings of record and performance-based personnel actions in their Performance Management Plans.

(d) *Forced distribution.* An agency may not prescribe a distribution of levels of ratings for employees covered by this subpart. However, agencies must establish procedures, such as reviews of standards and ratings for difficulty and strictness of application, to ensure that only those employees whose performance exceeds normal expectations are rated at levels above "Fully Successful". These procedures must be described in the agency's Performance Management Plan.

(e) *Inability to rate.* When an agency cannot prepare a rating of record at the time specified in the plan, the appraisal period shall be extended for the amount of time necessary to meet the minimum appraisal period at which time a rating of record shall be prepared.

(f) *Transfer of rating.* If an employee moves to a new agency or new organization in the employing agency at any time during the appraisal period, the current performance ratings of record must be transferred, as required by § 293.405(a) of this chapter. A summary rating must be prepared as required by § 430.205(a) of this subpart, which must be taken into consideration by the gaining agency when deriving the next rating of record.

**§ 430.207 Performance appraisal advisory committees. [Reserved]**

**§ 430.208 Training and evaluation.**

To assure that agency performance appraisal systems will be effectively implemented, agencies must provide appropriate training and information to supervisors and employees on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of the system(s) and to implement improvements as needed.

**§ 430.209 OPM review of performance appraisal systems.**

(a) OPM will review performance appraisal systems to determine conformance to requirements of law, OPM regulations, and OPM performance management policy.

(b) If OPM determines that an appraisal system does not meet the requirements and intent of subchapter I of chapter 43 of title 5, United States Code, or of this subpart, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

**§ 430.210 Performance appraisal plans.**

Agencies must submit proposed performance appraisal plans to OPM for approval as part of Performance Management Plans in accordance with Subpart A of this part and provisions of this subpart.

12. Subpart C is added to Part 430 to read as follows:

**Subpart C—Performance Appraisal for the Senior Executive Service (SES)**

Sec.

430.301 General.
430.302 Coverage.
430.303 Definitions.
430.304 SES performance appraisal systems.
430.305 Appraisal of performance.
430.306 Ratings.
430.307 Performance Review Boards (PRBs).
430.308 Training and evaluation.
430.309 OPM review of SES appraisal systems.
430.310 SES performance appraisal plans.

## Subpart C—Performance Appraisal for the Senior Executive Service (SES)

**§ 430.301 General.**

(a) *Statutory authority.* Chapter 43 of title 5, U.S. Code (5 U.S.C. 4311–4314) provides for the establishment of Senior Executive Service (SES) performance appraisal systems, and for appraisal of the performance of senior executives (as defined in 5 U.S.C. 3132(a)). This subpart contains regulations which the Office of Personnel Management (OPM) has prescribed for performance appraisal in

the SES, and supplements and implements the provisions of 5 U.S.C. 4311–4315.

(b) *Purpose.* It is the purpose of this subpart to ensure that performance appraisal systems for employees are used as a tool for executing basic management and supervisory responsibilities by—

(1) Communicating and clarifying organizational goals and objectives;

(2) Identifying individual accountability for the accomplishment of agency goals and objectives;

(3) Evaluating and improving individual and organizational accomplishments; and

(4) Using the results of performance appraisal as a basis for adjusting base pay, training, rewarding, reassigning, retaining, and removing employees.

**§ 430.302 Coverage.**

(a) All senior executives covered by subchapter II of chapter 31 of title 5, United States Code, are covered by this part.

(b) Section 3132(a)(1) of title 5, United States Code identifies agencies covered by this subpart.

**§ 430.303 Definitions.**

In this subpart, terms are defined as follows:

"Appointing authority" means the agency or department head or his or her designee.

"Appraisal" means the act or process of reviewing and evaluating the performance of the executive against the described performance standard(s).

"Appraisal period" means the period of time established by an appraisal system for which the senior executive's performance will be reviewed.

"Appraisal system" means a performance appraisal system established by an agency or component of an agency under subchapter II of chapter 43 of title 5, U.S.C. and this subpart which provides for identification of critical and noncritical elements, establishment of performance standards, communication of elements and standards to senior executives, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

"Critical element" means a component of a position consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that unsatisfactory performance on the element would result in unsatisfactory performance in the position.

"Final rating" means the rating of record assigned by an appointing authority after considering the recommendations of a Performance Review Board.

"Initial rating" means the summary rating made by the senior executive's supervising official and provided to the Performance Review Board.

"Non-critical element" means a component of an executive's position which does not meet the definition of a critical element, but is of sufficient importance to warrant written appraisal. Non-critical elements are optional and may be used at agency discretion.

"Performance" means the senior executive's accomplishment of assigned work as specified in the critical and non-critical elements of the executive's position.

"Performance Appraisal": [see Appraisal]

"Performance Appraisal System": see Appraisal system.

"Performance Management Plan" means the description of the agency's methods which integrate performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of the agency's mission and goals. The Performance Management Plan, which includes the SES performance appraisal plan, must be submitted to OPM for review and approval as required in § 430.310 of this subpart and in Subpart A of this part.

"Performance plan" means the aggregation of all of the senior executive's written critical and non-critical elements and performance standard(s).

"Performance requirement" means performance standard.

"Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, cost efficiency, timeliness, and manner of performance.

"Progress review" means a review of the executive's progress toward achieving the performance standards and is not in itself a rating.

"Rating of record" means the final rating.

"Summary rating" means the written record of the appraisal of each critical and non-critical element and the assignment of a summary rating level (as specified in § 430.304 (f) and (g) of this subpart).

**§ 430.304 SES performance appraisal systems.**

(a) Each agency shall develop one or more performance appraisal systems for executives covered by this subpart.

(b) Under each SES appraisal system, critical elements must be included and non-critical elements may be included in individual performance plans. An executive must be appraised on each critical and non-critical element in the executive's performance plan, unless the executive has had insufficient opportunity to demonstrate performance on the element. A summary rating level, as specified in paragraph (g) of this section, must be assigned.

(c) Each SES appraisal system shall require establishing performance plans in consultation with the senior executive. Final authority for establishing such plans rests with the supervising official.

(d) (1) Each SES appraisal system shall provide for establishing performance elements and standards based on the requirements of senior executives' positions, communicating those elements and standards to senior executives at or before the beginning of each appraisal period, providing written performance plans normally within 30 days of the beginning of the appraisal period, and appraising senior executives at least annually based on a comparison of performance with the standards established for the appraisal period.

(2) Accomplishment of organizational objectives must be included in performance plans by incorporating objectives, goals, program plans, work plans, or by other similar means that account for program results.

(e) Each SES appraisal system shall provide for a minimum of three rating levels for each critical element. Performance standards must be written at the "Fully Successful" level for all critical and non-critical elements and may be written at other levels. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level.

(f) Each SES appraisal system shall include a method for deriving a summary rating level from performance appraisals of critical elements and, at agency discretion, appraisals of non-critical elements. If appraisals of non-critical elements are considered in deriving summary rating levels, the derivation method must show that more weight will be given to critical elements than non-critical elements.

(g) Each SES appraisal system shall provide for five summary rating levels. The rating levels must include an "Unsatisfactory" level, a "Minimally

Satisfactory" level, a "Fully Successful" level and two levels which are above "Fully Successful." For purposes of this subpart, "Unsatisfactory" is referred to as level 1, "Minimally Satisfactory" is level 2, "Fully Successful" is level 3, the level one level above "Fully Successful" is level 4, and the level two levels above "Fully Successful" is level 5.

(h) Each SES appraisal system shall provide for assisting employees in improving performance rated at a level below the "Fully Successful" level. Such assistance may include but is not limited to formal training, on-the-job training, counseling, and closer supervision.

(i) Subject to the provisions of Part 359, Subpart E of this chapter:

(1) Any executive receiving a level 1 ("Unsatisfactory") rating of record shall be reassigned or transferred within the Senior Executive Service, or removed from the Senior Executive Service;

(2) Any executive who receives two level 1 ("Unsatisfactory") ratings of record in any period of 5 consecutive years shall be removed from the Senior Executive Service; and

(3) Any executive who twice in any period of 3 consecutive years receives less than a level 3 "Fully Successful" rating of record shall be removed from the Senior Executive Service.

**§ 430.305 Appraisal of performance.**

(a) *Appraisal period.* (1) Each agency appraisal system shall establish an official appraisal period for which a rating of record shall be prepared. The appraisal period will end no earlier than June 30 nor later than September 30 of the same year. Systems shall provide for preparing a summary rating when an executive changes positions during the appraisal period, if the executive has served for the minimum appraisal period in the position from which he/she has changed; agency Performance Management Plans must describe how these ratings will be taken into consideration in deriving the next rating of record. A summary rating prepared when an executive changes positions during the appraisal period shall not be considered an initial rating.

(2) Except as provided in paragraph (b) of this section, a performance appraisal period may be terminated in any case in which the agency making an appraisal determines that an adequate basis exists on which to appraise and rate the senior executive's performance.

(3) Notwithstanding paragraphs (a)(2) and (b) of this section, in the case of a career appointee, an appraisal and rating may not be made within 120 days after the beginning of a new Presidential administration.

(b) *Minimum appraisal period.* Agency appraisal systems shall establish a minimum appraisal period of at least 90 days and not more than 120 days, except as provied in paragraph (a)(3) of this section.

(c) *Appraisal of each element.* An executive must be appraised on each critical and non-critical element in the executive's performance plan, unless the executive has had insufficient opportunity to demonstrate performance on the element.

(d) *Appraisal of performance on details.* (1) When senior executives are detailed or temporarily reassigned within the same agency, and the detail or temporary assignment is expected to last 120 days or longer, agencies shall provide written critical elements and performance standards to the executives as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary assignment. Ratings on critical elements must be prepared for these details and temporary assignments and must be considered in deriving a senior executive's next rating of record.

(2) When senior executives are detailed outside of the agency, the employing agency must make a reasonable effort to obtain appraisal information from the outside organization, which shall be considered in deriving the executive's next rating of record.

(i) If an executive has served in the employing agency for the minimum appraisal period, the executive must be rated. The rating shall take into consideration appraisal information obtained from the borrowing organization.

(ii) If an executive has not served in the agency for the established minimum appraisal period, but has served for the minimum appraisal period outside the employing agency, the employing agency must make a reasonable effort to prepare a rating using appraisal information obtained from the borrowing organization.

(e) *Progress review.* A progress review shall be held for each executive at least once during the appraisal period. At a minimum, executives shall be informed of their level of performance by comparison with the performance elements and standards established for their positions.

**§ 430.306 Ratings.**

(a) *Initial Rating.* Appraisal systems shall provide for:

(1) A written initial rating of the executive's performance made by the executive's supervising official, and provided to the senior executive;

(2) An opportunity for the senior executive to respond in writing to an initial rating;

(3) An opportunity for review of the rating by an employee in a higher executive level than that of the supervisor, unless there is no one at a higher level, before review by the PRB as provided in § 430.307 (e) and (g);

(4) Provision of the senior executive's response to both the official making the higher level review and to the PRB; and

(5) Provision of copies of the reviewer's comments and recommendations to the senior executive, the supervising official, and the PRB.

(b) *Higher level review.* (1) Agency performance appraisal systems may provide for a mandatory second level review of all initial ratings.

(2) A senior executive is entitled to only one higher level review unless the agency provides otherwise.

(c) *Final rating.* A written rating of record of the executive's performance shall be made on an annual basis by the appointing authority only after considering the recommendations by the PRB with respect to the performance of the senior executive as provided in § 430.307.

(d) *Forced distribution.* An agency may not prescribe a distribution of levels of ratings for employees covered by this subpart. However, agencies must establish procedures, such as reviews of standards and ratings for difficulty and strictness of application, to ensure that only those employees whose performance exceeds normal expectations are rated at levels above "Fully Successful". These procedures must be described in the agency's Performance Management Plan.

(e) *Inability to rate.* When an agency cannot prepare a rating of record at the time specified in the plan, the executive's appraisal period shall be extended for the amount of time necessary to meet the minimum appraisal period at which time a rating of record shall be prepared.

(f) *Transfer of rating.* If an executive moves to a new agency or new organization in the employing agency at any time during the appraisal period, the current performance ratings of record must be transferred, as required by § 293.404(b)(2) of this chapter. A summary rating must be prepared as required in § 430.305(a) which must be taken into consideration by the gaining agency when deriving the next rating of record.

(g) *Documentation.* Agencies shall provide to each senior executive a copy of the following documents at the time

they are prepared, the initial rating, along with notification of the right to respond in writing and to request a higher level review before the rating becomes final; any comments and recommended changes by a higher level executive; and the final rating. As required in § 293.404(b)(1) of this chapter, agencies are required to maintain all performance related records for no less than 5 years from the date the rating is issued.

**§ 430.307 Performance Review Boards (PRBs).**

As required by 5 U.S.C. 4314(c), each agency is required to establish one or more PRBs to make recommendations to the appointing authority on the performance of senior executives in the agency.

(a) Each PRB in an agency shall have three or more members appointed by the head of the agency or by another official or group acting on behalf of the head of the agency.

(b) Notice of appointment to the PRB must be published in the Federal Register.

(c) The members of the PRB must be appointed in such a manner as to assure consistency, stability, and objectivity in performance appraisal.

(d) When appraising a career appointee, more than one-half of the membership of the PRB must be SES career appointees unless OPM determines that there exists an insufficient number of career appointees available to comply with the requirement.

(e) Each PRB will review and evaluate the initial rating, the senior executive's written response, if any, and the written comments, if any, on the initial rating by a higher level executive, and will conduct such further review as the PRB finds necessary.

(f) Individual PRB members must not take part in any PRB deliberations involving their own appraisals.

(g) The PRB must make a written recommendation concerning each senior executive's rating of record.

**§ 430.308 Training and evaluation.**

To assure that agency performance appraisal systems will be effectively implemented, agencies must provide appropriate training and information to supervisors and senior executives on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of the system(s) and to implement improvements as needed.

**§ 430.309 OPM review of SES appraisal systems.**

(a) OPM will review performance appraisal systems to determine if they conform to requirements of law, OPM regulations, and OPM performance management policy.

(b) If OPM determines that an appraisal system does not meet the requirements and intent of subchapter II of chapter 43 of title 5, United States Code, or of this subpart, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

**§ 430.310 SES performance appraisal plans.**

Agencies must submit proposed performance appraisal plans to OPM for approval as part of Performance Management Plans in accordance with Subpart A of this part and provisions of this subpart.

13. Subpart E is added to Part 430 to read as follows:

**Subpart E—Performance Awards**

Sec.

430.501 Authority and coverage.
430.502 Definitions.
430.503 Policy.
430.504 Funding and payment. [Reserved.]
430.505 Responsibilities of the Office of Personnel Management.
430.506 Agency responsibilities.

## Subpart E—Performance Awards

**§ 430.501 Authority and coverage.**

(a) This subpart contains the Office of Personnel Management's (OPM's) regulatory requirements for establishing and conducting the performance awards component of the Performance Management System, under the authority of title 5, United States Code, chapters 43 and 45.

(b) This subpart applies to employees as defined under section 2105 of title 5, United States Code, but does not include employees under the Performance Management and Recognition System, nor employees in the Senior Executive Service.

(c) This subpart applies to agencies as defined in section 4501 of title 5, United States Code.

(d) Refer to Part 451, Subpart A of this chapter for the regulatory requirements for granting Superior Accomplishment Awards to employees for suggestions, inventions, and special acts or services.

**§ 430.502 Definitions.**

In this subpart, terms are defined as follows:

"Performance award" means a performance-based cash payment to an employee based on the employee's rating of record. A performance award does not increase base pay.

"Performance award budget" means the amount of money allocated by an agency for distribution as performance awards to covered employees.

"Performance Management Plan" means the description of the agency's methods which integrate performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals. The Performance Management Plan, which includes the performance awards plan, must be submitted to OPM for review and approval as required by § 430.506 of this subpart and Subpart A of this part.

"Rating of record" means the summary rating required at the time specified in the Performance Management Plan or at such other times as the plan specifies for special circumstances.

**§ 430.503 Policy.**

(a) The purpose of performance awards is to motivate employees by recognizing and rewarding those who attain high levels of performance.

(b) An award under this subpart shall be based on the employee's rating of record for the current appraisal period for which performance awards are being paid.

(c) (1) Agency procedures for making performance awards determinations must include a requirement for review and approval of each determination by an official of the agency who is at a higher level than the official who made the initial decision, unless there is no official at a higher level in the agency, and also by the official(s) with responsibility for managing the performance awards budget within the agency.

(2) Higher level review and approval of performance awards determinations, as required in paragraph (c)(1) of this section must be made by the officials also responsible for making the performance appraisal decisions.

(d) Awards under this part shall be documented in the Official Personnel Folder to reflect the nature of the award, including the amount of award.

(e) A performance award shall be given due weight when rating and ranking an employee for a promotion, as provided in 5 U.S.C. 3362.

(f) OPM encourages agencies to make maximum use of their authorities under chapters 43 and 45 of title 5, United States Code, within existing appropriated funds to establish and administer performance awards programs that best support and enhance agency and national goals and meet employee recognition needs.

**§ 430.504 Funding and payment. [Reserved]**

**§ 430.505 Responsibilities of the Office of Personnel Management.**

In accordance with Subpart A of this part, OPM shall review and approve the agency performance awards component of the Performance Management Plan, and any proposed plan revisions which have an impact on how an agency meets statutory and regulatory requirements.

**§ 430.506 Agency responsibilities.**

(a) The head of each agency shall, within existing appropriated funds, establish a performance awards program as a component of the Performance Management System.

(b) The head of each agency shall submit to OPM—

(1) A performance awards plan, as part of the Performance Management Plan, which includes provisions for determining the agency performance awards fund, and the method for determining projected expenditures, for review and approval as provided in Subpart A of this part;

(2) Proposed plan revisions for review and approval as required in Subpart A of this part;

(3) All recommendations for performance awards in excess of $10,000 up to $25,000 for review and approval;

(4) At the beginning of each fiscal year, the estimated performance awards budget, including the funding level used; and

(5) An annual report on performance awards activities for the past fiscal year.

## PART 431—[REMOVED]

14. Part 431 is removed.

## PART 451—INCENTIVE AWARDS

15. The heading for Part 451 is revised as set out above and the authority citation for Part 451 is revised to read as follows:

Authority: 5 U.S.C. 4506 and 5407.

16. In Part 451, Subpart B is redesignated as Subpart A and revised to read as follows:

### Subpart A—Agency Superior Accomplishment Awards

Sec.


451.101 Authority and coverage.
451.102 Purpose.
451.103 Definitions.
451.104 Policy.
451.105 Payment.
451.106 Responsibilities of the Office of Personnel Management.
451.107 Agency responsibilities.


**§ 451.101 Authority and coverage.**

(a) This subpart contains the regulatory requirements of the Office of Personnel Management (OPM) for establishing and conducting the Superior Accomplishment Awards component of the Performance Management System under the authority of title 5, United States Code, chapters 43, 45, and 54.

(b) This subpart applies to employees as defined by section 2105 of title 5, United States Code. Employees covered by the Performance Management and Recognition System under chapter 54 of title 5, United States Code, are covered by the provisions of this subpart.

(c) This subpart applies to agencies as defined in section 4501 of title 5, United States Code.

**§ 451.102 Purpose.**

Superior accomplishment awards are designed to improve Government efficiency, economy and effectiveness by motivating employees to increase productivity and creativity by rewarding their efforts which benefit the Government.

**§ 451.103 Definitions.**

"Award" or "superior accomplishment award" means a monetary or non-monetary award for a contribution resulting in tangible benefits or savings and/or intangible benefits to the Government.

"Contribution" means an accomplishment achieved through an individual or group effort in the form of a suggestion, an invention or a special act or service in the public interest connected with or related to official employment, which contributes to the efficiency, economy, or other improvement of Government operations, or achieves a significant reduction in paperwork.

"Intangible benefits" means benefits to the Government which cannot be measured in terms of dollar savings.

"Non-monetary award" means a medal, certificate, plaque, citation, badge, or other similar item that has an award or honor connotation.

"Performance Management Plan" means the description of the agency's methods which integrate performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals. The Performance Management Plan, which includes the superior accomplishment awards plan, must be submitted to OPM for review and approval as required in Part 430, Subpart A and § 451.107 of this subpart.

"Special act or service" means a contribution or accomplishment in the public interest which is:

(a) A non-recurring contribution either within or outside of job responsibilities;

(b) A scientific achievement; or

(c) An act of heroism.

"Superior accomplishment award": see "Award".

"Tangible benefits" means benefits or savings to the Government that can be measured in terms of dollars.

**§ 451.104 Policy.**

(a) The Office of Personnel Management encourages agencies to make maximum use of their authorities under chapters 45 and 54 of title 5, United States Code to:

(1) Establish and administer superior accomplishment awards programs which best support and enhance agency and national goals, and meet employee recognition needs; and

(2) Provide for adequate funds to provide for payment of awards, and staffing and support services to assure prompt action on awards recommendations, and effective promotion and publicity of the program.

(b) Superior accomplishment awards programs shall provide for:

(1) The granting of recognition commensurate with the value of the contribution to the Government; and

(2) Obtaining maximum benefits for the Government, whenever possible, by considering the applicability of employee contributions throughout Government.

(c) An award under this subpart may be granted alone or in addition to a performance award granted under Parts 430, Subpart E, and 540 of this chapter, or a quality step increase granted under Part 531, Subpart E.

(d) An award under this part shall not be used as a substitute for other personnel actions, or as a substitute for pay.

(e) To be awarded under this subpart, a contribution must:

(1) Have been made while the contributor was a Government employee;

(2) Be supported by a written justification separate from the employee's rating of record; and

(3) Be approved at a management level higher than that of the individual who recommended use of the suggestion or invention, or recommended the award.

(f) Acceptance of a monetary award consitutes an agreement that the use by the Government of the idea, method, or device for which the award is paid does

not form the basis of a further claim against the Government.

(g) Awards under this part shall be documented in the Official Personnel Folder to reflect the nature of the award, including the amount of award.

(h) Due weight shall be given to an award under this part when rating and ranking an employee for promotion as provided in 5 U.S.C. 3362.

(i) Agencies shall assure that superior accomplishment awards programs are effectively implemented by providing appropriate training and information to supervisors and employees on the program, and establishing methods and procedures to evaluate periodically the effectiveness of the program and implement improvements as needed.

(j) Superior accomplishment awards shall not be mandatory.

**§ 451.105 Payment.**

(a) An award under this subpart is in addition to regular pay and does not increase an employee's base pay. The award is subject to the withholding of income taxes.

(b) When an award is approved for an employee of another agency, the benefiting agency shall make arrangements to transfer funds to the employing agency to cover the award. If the administrative costs of transferring funds would exceed the amount of the award, the employing agency shall absorb the award costs and pay the award.

(c) When an award is approved for a member of the armed forces for a suggestion, invention, or scientific achievement, arrangements shall be made to transfer funds to the agency having jurisdiction over the member in accordance with Executive Order 11438, "Prescribing Procedures Governing Interdepartmental Cash Awards to the Members of the Armed Forces".

**§ 451.106 Responsibilities of the Office of Personnel Management.**

(a) OPM shall review and approve the agency superior accomplishment awards component of the Performance Management Plan, and any changes to the plan that modify any element of the agency's system that is included in a Performance Management Plan Checklist, as required in Part 430, Subpart A, of this chapter.

(b) OPM shall review and approve or disapprove all recommendations for agency awards under this subpart in excess of $10,000 up to $25,000.

**§ 451.107 Agency responsibilities.**

(a) The head of each agency shall submit to OPM:

(1) The superior accomplishment awards component of the Performance Management Plan for review and approval as required in Part 430, Subpart A;

(2) Any changes to the plan that modify any element of the agency's system that is included in a Performance Management Plan Checklist as required in Part 430, Subpart A, for review and approval;

(3) Award recommendations in excess of $10,000 up to $25,000; and

(4) An annual report on program activities and expenditures for the past fiscal year and the amount budgeted for superior accomplishment awards for the current fiscal year.

(b) Agencies shall give consideration to accomplishment and adopted ideas for wider application both within the agency and Government-wide, and provide for prompt referral when appropriate.

17. In Part 451, a new Subpart B is added to read as follows:

**Subpart B—Presidential Awards**

Sec.

451.201 Authority and coverage.

451.202 Payment.

451.203 Responsibilities of the Office of Personnel Management.

**§ 451.201 Authority and coverage.**

(a) Under title 5, United States Code, chapters 45 and 54, the President may pay a cash award to and incur necessary expenses for the honorary recognition of an employee who:

(1) By his/her suggestion, invention or other personal effort contributes to the efficiency, economy, or other improvement of Government operations, or achieves a significant reduction in paperwork, or

(2) Performs an exceptionally meritorious special act or service in the public interest in connection with or related to official employment.

(b) During any fiscal year, the President may, subject to the provisions of 5 U.S.C. 4507, award to any Senior Executive career appointee recommended by OPM the rank of—

(1) Meritorious Executive, for sustained accomplishment, or

(2) Distinguished Executive, for sustained extraordinary accomplishment.

(c) Except as provided in paragraph (b) of this section, this subpart applies to employees as defined by section 2105 of title 5, United States Code. Employees covered by the Performance Management and Recognition System under title 5, United States Code, chapter 54 are covered by the provisions of this subpart.

(d) This subpart applies to agencies as defined in section 4501 of title 5, United States Code.

**§ 451.202 Payment.**

(a) A Presidential award is paid by the agency(ies) primarily benefiting from the employee contribution.

(b) A Presidential award may be in addition to an agency award under Subpart A of this part.

**§ 451.203 Responsibilities of the Office of Personnel Management.**

(a) The Office of Personnel Management shall review annually agency recommendations for Presidential Rank Awards for career appointees of the Senior Executive Service under section 4507 of title 5, United States Code, and recommend to the President which of those career appointees should receive awards.

(b) The Office of Personnel Management, in accordance with Executive Order 10717, as amended, shall review agency recommendations for the President's Award for Distinguished Federal Civilian Service and recommend to the President which career employees should receive this award.

(c) Under Executive Order 11228, section 2, the Office of Personnel Management has the authority to determine the activity or activities primarily benefiting from any suggestion, invention, or other contribution which forms the basis for a Presidential award under 5 U.S.C. 4504 and 5407.

18. In Part 451, Subpart C is reserved, as follows:

**Subpart C—Productivity Gainsharing Programs [Reserved]**

## PART 531—PAY UNDER THE GENERAL SCHEDULE

19. The heading for Part 531 is revised as set forth above and the authority citation for Part 531, Subpart D, is revised to read as follows:

**Authority:** 5 U.S.C. 5301, 5335, and 5338 and E.O. 11721 as amended, section 402, unless otherwise noted.

20. Section 531.401 is revised to read as follows:

**§ 531.401 Principal authorities.**

The following are the principal authorities for the regulations in this subpart:

(a) Section 2301(b)(3) of title 5, United States Code, provides in part that "appropriate incentives and recognition should be provided for excellence in performance."

(b) Section 5301(a)(2) of title 5, United States Code, provides that "pay distinctions be maintained in keeping with work and performance distinctions."

(c) Section 402 of E.O. 11721, as amended, provides that "The Civil Sevice Commission [Office of Personnel Management] shall issue such regulations and standards as may be necessary to ensure that only those employees whose work is of an acceptable level of competence receive periodic step-increases under the provisions of section 5335 of title 5, United States Code."

21. Section 531.403 is amended by revising the terms "acceptable level of competence" and "critical element", to read as follows:

§ 531.403 Definitions.

In this subpart—

"Acceptable level of competence" means fully successful performance by an employee of the duties and responsibilities of his or her assigned position which warrants advancement of the employee's rate of basic pay to the next higher step of the grade of his or her position, subject to the requirements of § 531.404 of this subpart.

* * * * *

"Critical Element" has the meaning given that term in § 430.203 of this chapter.

* * * * *

22. Section 531.404 is revised to read as follows:

§ 531.404 Earning within-grade increase.

An employee paid at less than step 10 of the grade of his or her position shall earn advancement in pay to the next higher step of that grade upon meeting the following three requirements established by law:

(a) The employee's performance of the duties and responsibilities of his or her assigned position must be at an acceptable level of competence, as defined in this subpart by authority of Section 402 of E.O. 11721, as amended. To be determined at an acceptable level of competence, the employee's most recent rating of record as defined in the agency Performance Management Plan, must be at least level 3 ("Fully Successful").

(1) When a within-grade increase decision is not consistent with the employee's most recent rating of record a more current rating of record must be prepared.

(2) The rating of record used as the basis for an acceptable level of competence determinatio for a within-grade increase must have been assigned no earlier than the most recently completed appraisal period.

(b) The employee must have completed the required waiting period for advancement to the next higher step of the grade of his or her position.

(c) The employee must not have received an equivalent increase during the waiting period.

23. Sections 531.408 (b) and (c) are revised to read as follows:

§ 531.408 Communication of performance requirements.

* * * * *

(b) Employees covered by an appraisal system established under Part 430, Subpart B of this chapter shall be informed of the specific performance requirements that constitute an acceptable level of competence within the time frame and by means of communication of performance standards established under Part 430, Subpart B of this chapter.

(c) Employees not covered by an appraisal system established under Part 430, Subpart B of this chapter shall be informed, under procedures established by the head of the agency, of the specific requirements for performance at an acceptable level of competence within a reasonable time after initial appointment or permanent change in position.

24. In § 531.409, paragraphs (b), (c), (d) and (e)(2)(i) are revised to read as follows:

§ 531.409 Acceptable level of competence determinations.

* * * * *

(b) *Basis for determination.* When applicable, an acceptable level of competence determination shall be based on a current rating of record made under Part 430 of this chapter. For those agencies not covered by 5 U.S.C. chapter 43 and for employees in positions excluded from 5 U.S.C. 4301, an acceptable level of competence determination shall be based on minimal performance appraisal requirements issued by OPM. If an employee has been reduced in grade because of "Unacceptable" performance and has served in one position at the lower grade for at least the minimum appraisal period established by the agency, a rating of record at the lower grade shall be used as the basis for an acceptable level of competence determination.

(c) *Delay in determination.* (1) An acceptable level of competence determination must be delayed when either of the following applies:

(i) An employee has not had the minimum period of time established by the agency to demonstrate acceptable performance because he or she has not been informed of the specific requirements for performance at an acceptable level of competence in his or her current position, and the employee has not been given a performance rating in any position within 90 days before the end of the waiting period; or

(ii) An employee is reduced in grade because of unacceptable performance to a position in which he or she is eligible for a within-grade increase or will become eligible within the minimum period of time established by the agency to demonstrate acceptable performance.

(2) When an acceptable level of competence determination has been delayed under this subpart:

(i) The employee shall be informed that his or her determination is postponed and the rating period extended and shall be told of the specific requirements for performance at an acceptable level of competence.

(ii) An acceptable level of competence determination shall then be made upon completion of the minimum appraisal period established by the agency performance appraisal plan and shall be based on the employee's rating of record completed at the end of the appraisal period.

(iii) If, following the delay, the employee's performance is determined to be at an acceptable level of competence, the within-grade increase will be granted retroactively to the beginning of the pay period following completion of the applicable waiting period.

(d) *Waiver of requirement for determination.* An acceptable level of competence determination shall be waived and a within-grade increase granted when an employee has not served in any position for the minimum appraisal period under an applicable agency performance appraisal system during the final 52 calendar weeks of the waiting period for one or more of the following reasons:

(1) Because of absences that are creditable service in the computation of a waiting period or periods under § 531.406 of this subpart;

(2) Because of paid leave;

(3) Because the employee received service credit under the back pay provisions of subpart H of Part 550 of this chapter;

(4) Because of details to another agency or employer for which no rating has been prepared; or

(5) Because of long-term training.

In such a situation, there shall be a presumption that the employee would have performed at an acceptable level

of competence had the employee performed the duties of his or her position of record for the minimum appraisal period under the applicable agency performance appraisal system.

* * * * *

(e) Notice of determination.

(2) * * *

(i) Set forth the reasons for any negative determination and the respects in which the employee must improve his or her performance in order to be granted a within-grade increase under § 531.411 of this subpart.

* * * * *

25. Section 531.411 is revised to read as follows:

**§ 531.411 Continuing evaluation after withholding a within-grade increase.**

When a within-grade increase has been withheld, an agency may, at any time thereafter, prepare a new rating of record for the employee and grant the within-grade increase when it determines that he or she has demonstrated sustained performance at an acceptable level of competence. However, the agency shall determine whether the employee's performance is at an acceptable level of competence after no more than 52 calendar weeks following the original eligibility date for the within-grade increase and, for as long as the within-grade increase continues to be denied, determinations will be made after no longer than each 52 calendar weeks.

Subpart E—Quality Step Increases

26. The authority citation for Part 531, Subpart E, is revised to read as follows:

Authority: 5 U.S.C. 5336 and E.O. 11721, as amended.

27. In Subpart E, §§ 531.503 and 531.504 are revised to read as follows:

* * * * *

**§ 531.503 Purpose of quality step increases.**

The purpose of quality step increases is to recognize outstanding performance by granting faster than normal step increases.

**§ 531.504 Level of performance required for quality step increase.**

A quality step increase shall not be required but may be granted only to an employee who receives a rating of record at level 5 (Outstanding), as defined in Part 430, Subpart B, of this chapter.

28. Sections 531.505 through 531.507 are revised to read as follows:

**§ 531.505 Restrictions on granting quality step increases.**

As provided by 5 U.S.C. 5336, a quality step increase may not be granted to an employee who has received a quality step increase within the preceding 52 consecutive calendar weeks.

**§ 531.506 Effective date of quality step increase.**

A determination to grant a quality step increase should be made as soon as practicable after a rating of record is approved. The quality step increase should be made effective as soon as possible after it is approved.

**§ 531.507 Agency plans for granting quality step increases.**

Each agency shall include a plan for granting quality step increases in the agency's Performance Management Plan, as required by Part 430, Subpart A of this chapter. The Plan shall—

(a) Be as simple as practicable;

(b) Provide for delegation of authority to grant quality step increases to the lowest practicable level of management;

(c) Be reviewed and approved in accordance with the requirements in Part 430, Subpart A of this chapter;

(d) Provide for informing employees, at least annually, of the number of quality step increases granted in the agency by grade level; and

(e) Provide for appropriate training and information to all employees on QSI's and establish methods and procedures to evaluate periodically the effectiveness of the use of QSI's, and to implement improvements as needed.

29. In Part 531, Subpart F is removed.

30. In Part 532, Subpart H is removed.

PART 771—AGENCY ADMINISTRATIVE GRIEVANCE SYSTEM

31. The authority for Part 771 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 7301; E.O. 9830, 3 CFR 1943–1948 Comp., pages 606–624; E.O. 11222, 3 CFR 1964–1969 Comp., page 306.

32. In § 771.206, paragraph (c)(3) is removed, and paragraph (c)(1)(x) is revised, to read as follows:

Subpart B—General

**§ 771.206 Exclusions.**

* * * * *

(c) Matters excluded.

(1) * * *

(x) The granting of or failure to grant or the amount of an award granted under Part 430, Subpart E, or the granting of or failure to grant or the amount of an award granted under Part 451, or the adoption of or failure to adopt an employee suggestion or invention under Part 451, or the granting of or failure to grant an award of the rank of meritorious or distinguished executive under 4507 of title 5, United States Code and Part 451, Subpart B of this chapter.

* * * * *

[FR Doc. 86-5106 Filed 3-10-86; 8:45 am]

BILLING CODE 6325-01-M

Veterans Administration

# Memorandum

Attachment 3.1

Date August 11, 1986

To Chairman

From P.E. Wright

Subj "Signature " Problems

1. Several Board Members have requested that clarification be obtained as to the ongoing problems surrounding signatures of decisions by Board Members.

2. Medical Signatures: Last week there was an acute shortage of doctors on the eighth floor with the result that several physicians (Brown and Castellot specifically) were asked to "sign" numerous decisions of other sections. Both doctors expressed a great deal of frustration. The question was raised as to whether there is any practicable way to limit the number of "outside" signatures that any one doctor has to do per day or week. Put another way, is it fair for the same handfull of doctors, for whatever reason, to be asked every week to give "outside signatures" while other doctors are never or rarely asked. The record clearly shows that cooperation among the sections is not uniform and the problem should be addressed.

3. Multiple panels: A number of law members have asked me to raise the question of "multiple panels" within a Board section. It is fairly well known that at least 3 and possibly 5 or more sections are now operating with "two panels" on a regular basis. The reasons for this are many (production pressures, difference in philosophy of Board Members on cases, etc.) but the net effect is that law members from other sections are being asked, in medical cases, to give an "outside signature" in cases in which two panels are being run. In essence, all of these cases are being promulgated with at most two actual reviews. (Sometimes, I'm told, with only one review and two "outside" signatures.) The question raised is whether a section has the inherent discretion to operate more than one panel and, if so, what is then expected of Board Members in other sections?

4. Finally, related to the above, the question was asked as to how many signatures are required in order to "promulgate" a BVA decision. While custom calls for three signatures, is it possible (or ever advisable) that a decision could be released with 2 signatures?

P.E. Wright
VA Form 2105

Attachment 1--

Office of the Chairman
Board of Veterans Appeals
Washington, D.C. 20420

May 26, 1986

MEMORANDUM
NO. 01-86-25

SUBJ: Acting Board Members

Under authority of 38 U.S.C. § 4002 as amended by Public Law 98-223, section 208, I hereby designate the following individuals as Acting Board Members, effective April 1, 1986:

| Name | Time Served 7/1/85 - 6/30/86 |
|---|---|
| Barry Anderson | 1 quarter |
| Richardson A. Caffery | 3 quarters* |
| Steven Cohn | 2 quarters |
| Thomas J. Conway | 3 quarters |
| Terence D. Harrigan | 3 quarters |
| Josephine Hinrichsen, M.D. | 3 quarters |
| Francis Mastrota, M.D. | 2 quarters, 8 weeks (effective through 5/30/86) |
| Christopher Moran | 7 weeks (effective 5/12/86) |
| Nancy Phillips | 1 quarter |
| Robert Regan | 7 weeks (effective 5/12/86) |
| Nancy R. Robin | 2 quarters |
| Richard Shaw | 1 quarter |
| Leo W. Tobin, III | 1 quarter, 5 weeks (effective 5/27/86) |

The above designations remain in effect through June 30, 1986.

* Under the provisions of Public Law 98-223, these individuals are not eligible to serve as Acting Board Members in the following quarter (July 1, 1986, through September 30, 1986).

RESCISSION

Chairman's Memorandum No. 01-86-24, dated May 9, 1986, subject: Acting Board Members, is hereby rescinded in its entirety.

KENNETH E. EATON
Chairman

DISTRIBUTION: A (FOR BVA USE ONLY)
Chief, Paperwork Management and Regulations Service (731)

Office of the Chairman
Board of Veterans Appeals
Washington, D.C. 20420

September 29, 1986

MEMORANDUM
NO. 01-86-36

SUBJ: Acting Board Members

Under authority of 38 U.S.C. § 4002 as amended by Public Law 98-223, section 208, I hereby designate the following individuals as Acting Board Members, effective October 1, 1986:

| Name | Time Served 1/1/86 - 12/31/86 |
|---|---|
| James Anthony | 1 quarter |
| Eugene Caffey, M.D. | 2 quarters |
| Steven Cohn | 3 quarters |
| Thomas Dannaher | 1 quarter |
| Bernard P. Gallagher | 3 quarters |
| Terence D. Harrigan | 3 quarters* |
| Charles E. Hogeboom | 2 quarters |
| Nancy Johnson | 5 weeks (eff. 12/2/86 thru 12/31/86) |
| Stephen A. Jones | 3 quarters |
| Jeffrey J. Martin | 1 quarter |
| Timothy C. Pace | 3 quarters |
| Irvin Peiser, M.D. | 2 quarters, 8 weeks |
| Nancy Phillips | 3 quarters* |
| Sandra Salan, M.D. | 3 quarters |
| Paul M. Selfon, M.D. | 3 quarters* |
| Richard Shaw | 2 quarters |
| Leo W. Tobin, III | 2 quarters, 5 weeks |

The above designations remain in effect through December 31, 1986.

* Under the provisions of Public Law 98-223, these individuals are not eligible to serve as Acting Board Members in the following quarter (January 1, 1987, through March 31, 1987).

RESCISSION

Chairman's Memorandum No. 01-86-30, dated June 25, 1986, subject: Acting Board Members, is hereby rescinded in its entirety.

Kenneth E. Eaton

KENNETH E. EATON
Chairman

DISTRIBUTION: B D E (FOR BVA USE ONLY)
Chief, Paperwork Management and Regulations Service (731)

Office of the Chairman
Board of Veterans Appeals
Washington, D.C. 20420

December 30, 1986

MEMORANDUM
NO. 01-86-38

SUBJ: Acting Board Members

Under authority of 38 U.S.C. § 4002 as amended by Public Law 98-223, section 208, I hereby designate the following individuals as Acting Board Members, effective January 1, 1987:

| Name | Time Served 4/1/86 - 03/31/87 |
|---|---|
| James Anthony | 2 quarters |
| Michael L. Bledsoe | 1 quarter |
| Anne Marie Bradford | 1 quarter, 2 weeks |
| Eugene Caffey, M.D. | 3 quarters* |
| Steven Cohn | 3 quarters* |
| Thomas Dannaher | 2 quarters |
| Howard A. Donald, M.D. | 1 quarter |
| Frederick Donn, M.D. | 1 quarter, 7 weeks |
| Richard B. Frank | 1 quarter |
| Bernard P. Gallagher | 3 quarters* |
| Mary Gallagher | 1 quarter |
| Josephine Hinrichsen, M.D. | 3 quarters |
| Charles E. Hogeboom | 3 quarters* |
| Steven L. Keller | 1 quarter |
| Jeffrey J. Martin | 2 quarters |
| Irvin Peiser, M.D. | 2 quarters, 8 weeks |
| Robert Regan | 1 quarter, 7 weeks |
| Sandra Salan, M.D. | 3 quarters* |
| Jose Salcedo, M.D. | 1 quarter, 3 weeks |
| Paul M. Selfon, M.D. | 2 quarters, 4 weeks** |
| Richard Shaw | 3 quarters |
| Robert E. Sullivan | 1 quarter |
| Leo W. Tobin, III | 3 quarters (effective through 03/07/87)* |
| Ronald M. Yonemoto | 1 quarter |

The above designations remain in effect through March 31, 1987.

* UNDER THE PROVISIONS OF PUBLIC LAW 98-223, THESE INDIVIDUALS ARE NOT ELIGIBLE TO SERVE AS ACTING BOARD MEMBERS IN THE FOLLOWING QUARTER (APRIL 1, 1987, THROUGH JUNE 30, 1987).

** THIS INDIVIDUAL IS ELIGIBLE TO SERVE NOT MORE THAN 9 WEEKS IN THE QUARTER BEGINNING APRIL 1, 1987, THROUGH JUNE 30, 1987.

MEMORANDUM NO. 01-86-38

RESCISSION

Chairman's Memorandum No. 01-86-37, dated November 10, 1986, subject: Acting Board Members, is hereby rescinded in its entirety.

KENNETH E. EATON
Chairman

DISTRIBUTION: B D E (FOR BVA USE ONLY)
Chief, Paperwork Management and Regulations Service (731)

2.

Attachment 5.1

BOARD OF VETERANS APPEALS
Dispositions by Sections
Quarter Ending December 31, 1987

| Section | Decisions Dispatched | Allowed Number | Allowed Percent | Remanded Number | Remanded Percent | Denied Number | Denied Percent | Other Number | Other Percent | Benefits Granted | Letter Recons. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| App. Group I | | | | | | | | | | | |
| 1 | 472 | 65 | 13.8% | 72 | 15.3% | 335 | 71.0% | 0 | 0.0% | | |
| 2 | 393 | 33 | 8.4% | 35 | 8.9% | 322 | 81.9% | 3 | 0.8% | | |
| 4 | 480 | 53 | 11.0% | 52 | 10.8% | 375 | 78.1% | 0 | 0.0% | | |
| 5 | 472 | 54 | 11.4% | 95 | 20.1% | 322 | 68.2% | 1 | 0.2% | | |
| 6 | 443 | 98 | 22.1% | 136 | 30.7% | 208 | 47.0% | 1 | 0.2% | | |
| 8 | 432 | 83 | 19.2% | 92 | 21.3% | 257 | 59.5% | 0 | 0.0% | | |
| 10 | 550 | 79 | 14.4% | 146 | 26.5% | 325 | 59.1% | 0 | 0.0% | | |
| 11 | 464 | 55 | 11.9% | 32 | 6.9% | 377 | 81.3% | 0 | 0.0% | | |
| 19 | 473 | 50 | 10.6% | 79 | 16.7% | 344 | 72.7% | 0 | 0.0% | | |
| 21 | 434 | 37 | 8.5% | 83 | 19.1% | 314 | 72.4% | 0 | 0.0% | | |
| Subtotal | 4613 | 607 | 13.2% | 822 | 17.8% | 3179 | 68.9% | 5 | 0.1% | | |
| App. Group II | | | | | | | | | | | |
| 3 | 433 | 56 | 12.9% | 43 | 9.9% | 333 | 76.9% | 1 | 0.2% | | |
| 7 | 459 | 59 | 12.9% | 77 | 16.8% | 321 | 69.9% | 2 | 0.4% | | |
| 9 | 438 | 69 | 15.8% | 76 | 17.4% | 290 | 66.2% | 3 | 0.7% | | |
| 12 | 449 | 57 | 12.7% | 88 | 19.6% | 302 | 67.3% | 2 | 0.4% | | |
| 13 | 443 | 73 | 16.5% | 103 | 23.3% | 263 | 59.4% | 4 | 0.9% | | |
| 14 | 495 | 54 | 10.9% | 113 | 22.8% | 326 | 65.9% | 2 | 0.4% | | |
| 15 | 441 | 34 | 7.7% | 80 | 18.1% | 327 | 74.1% | 0 | 0.0% | | |
| 16 | 454 | 92 | 20.3% | 63 | 13.9% | 298 | 65.6% | 1 | 0.2% | | |
| 17 | 408 | 39 | 9.6% | 98 | 24.0% | 270 | 66.2% | 1 | 0.2% | | |
| 18 | 436 | 63 | 14.4% | 81 | 18.6% | 292 | 67.0% | 0 | 0.0% | | |
| 20 | 446 | 66 | 14.8% | 96 | 21.5% | 282 | 63.2% | 2 | 0.4% | | |
| Subtotal | 4902 | 662 | 13.5% | 918 | 18.7% | 3304 | 67.4% | 18 | 0.4% | | |
| All Sections | 9515 | 1269 | 13.3% | 1740 | 18.3% | 6483 | 68.1% | 23 | 0.2% | | |
| Travel Boards | 143 | 39 | 27.3% | 38 | 26.6% | 66 | 46.2% | 0 | 0.0% | | |
| Administrative | 261 | 0 | 0.0% | 178 | 68.2% | 0 | 0.0% | 83 | 31.8% | 428 | 33 |
| Total BVA | 9919 | 1308 | 13.2% | 1956 | 19.7% | 6549 | 66.0% | 106 | 1.1% | 428 | 33 |

(SECDISP1.F88)
(1/26/88)

BOARD OF VETERANS APPEALS
Dispositions by Sections
FY 1987

| Section | Decisions Dispatched | | Decisions Allowed | | | | Decisisions Remanded | | | | Decisions Denied | | | | Other Dispositions | | | | Benefits Granted | | Letter Recons. | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Qtr. | Cum. | Quarter No. | % | Cumulative No. | % | Quarter No. | % | Cumulative No. | % | Quarter No. | % | Cumulative No. | % | Quarter No. | % | Cumulative No. | % | Qtr | Cum | Qtr | Cum |
| Appellate Group I | | | | | | | | | | | | | | | | | | | | | | |
| 1 | 552 | 1813 | 73 | 13.2% | 249 | 13.7% | 73 | 13.2% | 239 | 13.2% | 401 | 72.6% | 1317 | 72.6% | 5 | 0.9% | 8 | 0.4% | | | | |
| 2 | 479 | 1642 | 40 | 8.4% | 153 | 9.3% | 45 | 9.4% | 219 | 13.3% | 393 | 82.0% | 1260 | 76.7% | 1 | 0.2% | 10 | 0.6% | | | | |
| 4 | 497 | 1801 | 62 | 12.5% | 207 | 11.5% | 68 | 13.7% | 244 | 13.5% | 365 | 73.4% | 1345 | 74.7% | 2 | 0.4% | 5 | 0.3% | | | | |
| 5 | 550 | 2041 | 55 | 10.0% | 186 | 9.1% | 113 | 20.5% | 434 | 21.3% | 380 | 69.1% | 1417 | 69.4% | 2 | 0.4% | 4 | 0.2% | | | | |
| 6 | 677 | 2492 | 103 | 15.2% | 411 | 16.5% | 214 | 31.6% | 748 | 30.0% | 359 | 53.0% | 1328 | 53.3% | 1 | 0.1% | 5 | 0.2% | | | | |
| 8 | 576 | 2044 | 69 | 12.0% | 272 | 13.3% | 110 | 19.1% | 328 | 16.0% | 397 | 68.9% | 1439 | 70.4% | 0 | 0.0% | 5 | 0.2% | | | | |
| 10 | 616 | 1973 | 79 | 12.8% | 264 | 13.4% | 183 | 29.7% | 573 | 29.0% | 353 | 57.3% | 1131 | 57.3% | 1 | 0.2% | 5 | 0.3% | | | | |
| 11 | 523 | 1920 | 60 | 11.5% | 220 | 11.5% | 44 | 8.4% | 128 | 6.7% | 417 | 79.7% | 1562 | 81.4% | 2 | 0.4% | 10 | 0.5% | | | | |
| 19 | 542 | 1995 | 72 | 13.3% | 262 | 13.1% | 95 | 17.5% | 371 | 18.6% | 374 | 69.0% | 1361 | 68.2% | 1 | 0.2% | 1 | 0.1% | | | | |
| 21 | 490 | 1696 | 48 | 9.8% | 163 | 9.6% | 110 | 22.4% | 415 | 24.5% | 331 | 67.6% | 1115 | 65.7% | 1 | 0.2% | 3 | 0.2% | | | | |
| Subtotal Appellate Group II | 5502 | 19417 | 661 | 12.0% | 2387 | 12.3% | 1055 | 19.2% | 3699 | 19.1% | 3770 | 68.5% | 13275 | 68.4% | 16 | 0.3% | 56 | 0.3% | | | | |
| 3 | 491 | 1654 | 72 | 14.7% | 225 | 13.6% | 67 | 13.6% | 181 | 10.9% | 352 | 71.7% | 1245 | 75.3% | 0 | 0.0% | 3 | 0.2% | | | | |
| 7 | 494 | 1764 | 59 | 11.9% | 258 | 14.6% | 83 | 16.8% | 311 | 17.6% | 348 | 70.4% | 1178 | 66.8% | 4 | 0.8% | 17 | 1.0% | | | | |
| 9 | 495 | 1834 | 57 | 11.5% | 229 | 12.5% | 112 | 22.6% | 370 | 20.2% | 325 | 65.7% | 1229 | 67.0% | 1 | 0.2% | 6 | 0.3% | | | | |
| 12 | 512 | 1933 | 51 | 10.0% | 184 | 9.5% | 116 | 22.7% | 519 | 26.8% | 339 | 66.2% | 1210 | 62.6% | 6 | 1.2% | 20 | 1.0% | | | | |
| 13 | 486 | 2040 | 75 | 15.4% | 350 | 17.2% | 117 | 24.1% | 445 | 21.8% | 294 | 60.5% | 1244 | 61.0% | 0 | 0.0% | 1 | 0.0% | | | | |
| 14 | 588 | 1942 | 61 | 10.4% | 242 | 12.5% | 151 | 25.7% | 406 | 20.9% | 376 | 63.9% | 1289 | 66.4% | 0 | 0.0% | 5 | 0.3% | | | | |
| 15 | 546 | 1843 | 51 | 9.3% | 175 | 9.5% | 64 | 11.7% | 246 | 13.3% | 428 | 78.4% | 1418 | 76.9% | 3 | 0.5% | 4 | 0.2% | | | | |
| 16 | 535 | 1870 | 92 | 17.2% | 326 | 17.4% | 82 | 15.3% | 301 | 16.1% | 360 | 67.3% | 1237 | 66.1% | 1 | 0.2% | 6 | 0.3% | | | | |
| 17 | 459 | 1785 | 52 | 11.3% | 216 | 12.1% | 140 | 30.5% | 544 | 30.5% | 264 | 57.5% | 1018 | 57.0% | 3 | 0.7% | 7 | 0.4% | | | | |
| 18 | 516 | 1927 | 67 | 13.0% | 256 | 13.3% | 97 | 18.8% | 297 | 15.4% | 352 | 68.2% | 1372 | 71.2% | 0 | 0.0% | 2 | 0.1% | | | | |
| 20 | 516 | 1461 | 81 | 15.7% | 202 | 13.8% | 126 | 24.4% | 374 | 25.6% | 308 | 59.7% | 879 | 60.2% | 1 | 0.2% | 6 | 0.4% | | | | |
| Subtotal | 5638 | 20053 | 718 | 12.7% | 2663 | 13.3% | 1155 | 20.5% | 3994 | 19.9% | 3746 | 66.4% | 13319 | 66.4% | 19 | 0.3% | 77 | 0.4% | | | | |
| All Sect. | 11140 | 39470 | 1379 | 12.4% | 5050 | 12.8% | 2210 | 19.8% | 7693 | 19.5% | 7516 | 67.5% | 26594 | 67.4% | 35 | 0.3% | 133 | 0.3% | | | | |
| Tvl. Board | 157 | 663 | 56 | 35.7% | 221 | 33.3% | 36 | 22.9% | 143 | 21.6% | 65 | 41.4% | 298 | 44.9% | 0 | 0.0% | 1 | 0.2% | | | | |
| Admin. | 317 | 1163 | 0 | 0.0% | 0 | 0.0% | 202 | 63.7% | 729 | 62.7% | 0 | 0.0% | 0 | 0.0% | 115 | 36.3% | 434 | 37.3% | 548 | 1781 | 43 | 137 |
| Total BVA | 11614 | 41296 | 1435 | 12.4% | 5271 | 12.8% | 2448 | 21.1% | 8565 | 20.7% | 7581 | 65.3% | 26892 | 65.1% | 150 | 1.3% | 568 | 1.4% | 548 | 1781 | 43 | 137 |

(SECDIS4Q.F87)

Attachment 5.3

BOARD OF VETERANS APPEALS
Dispositions by Sections
Quarter Ending March 31, 1988 and FY 1988 Cumulative

| Section | Decisions Dispatched | | --Decisions Allowed-- Quarter | | Cumulative | | Decisions Remanded Quarter | | Cumulative | | --Decisions Denied-- Quarter | | Cumulative | | Other Dispositions Quarter | | Cumulative | | Benefits Granted | | Letter Decns | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Qtr | Cum | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | Qtr | Cum | Qtr | Cum |
| Appellate Group I | | | | | | | | | | | | | | | | | | | | | | |
| 1 | 469 | 941 | 46 | 9.8% | 111 | 11.8% | 58 | 12.4% | 130 | 13.8% | 365 | 77.8% | 700 | 74.4% | 0 | 0.0% | 0 | 0.0% | | | | |
| 2 | 481 | 874 | 62 | 12.9% | 95 | 10.9% | 72 | 15.0% | 107 | 12.2% | 344 | 71.5% | 666 | 76.2% | 3 | 0.6% | 6 | 0.7% | | | | |
| 4 | 712 | 1192 | 58 | 8.1% | 111 | 9.3% | 86 | 12.1% | 138 | 11.6% | 566 | 79.5% | 941 | 78.9% | 2 | 0.3% | 2 | 0.2% | | | | |
| 5 | 550 | 1022 | 64 | 11.6% | 118 | 11.5% | 101 | 18.4% | 196 | 19.2% | 384 | 69.8% | 706 | 69.1% | 1 | 0.2% | 2 | 0.2% | | | | |
| 6 | 466 | 909 | 116 | 24.9% | 214 | 23.5% | 140 | 30.0% | 276 | 30.4% | 210 | 45.1% | 418 | 46.0% | 0 | 0.0% | 1 | 0.1% | | | | |
| 8 | 529 | 961 | 78 | 14.7% | 161 | 16.8% | 74 | 14.0% | 166 | 17.3% | 376 | 71.1% | 634 | 65.9% | 1 | 0.2% | 1 | 0.1% | | | | |
| 10 | 549 | 1099 | 67 | 12.2% | 146 | 13.3% | 146 | 26.6% | 292 | 26.6% | 334 | 60.8% | 659 | 60.0% | 2 | 0.4% | 2 | 0.2% | | | | |
| 11 | 584 | 1048 | 89 | 15.2% | 144 | 13.7% | 69 | 11.8% | 101 | 9.6% | 425 | 72.8% | 802 | 76.5% | 1 | 0.2% | 1 | 0.1% | | | | |
| 13 | 516 | 989 | 48 | 9.3% | 98 | 9.9% | 73 | 14.1% | 152 | 15.4% | 394 | 76.4% | 738 | 74.6% | 1 | 0.2% | 1 | 0.1% | | | | |
| 21 | 360 | 794 | 46 | 12.8% | 83 | 10.5% | 81 | 22.5% | 164 | 20.7% | 231 | 64.2% | 545 | 68.6% | 2 | 0.6% | 2 | 0.3% | | | | |
| Subtotal | 5216 | 9829 | 674 | 12.9% | 1281 | 13.0% | 900 | 17.3% | 1722 | 17.5% | 3629 | 69.6% | 6808 | 69.3% | 13 | 0.2% | 18 | 0.2% | | | | |
| Appellate Group II | | | | | | | | | | | | | | | | | | | | | | |
| 3 | 423 | 856 | 55 | 13.0% | 111 | 13.0% | 49 | 11.6% | 92 | 10.7% | 318 | 75.2% | 651 | 76.1% | 1 | 0.2% | 2 | 0.2% | | | | |
| 7 | 508 | 967 | 79 | 15.6% | 138 | 14.3% | 88 | 17.3% | 165 | 17.1% | 336 | 66.1% | 657 | 67.9% | 5 | 1.0% | 7 | 0.7% | | | | |
| 9 | 456 | 894 | 72 | 15.8% | 141 | 15.8% | 81 | 17.8% | 157 | 17.6% | 303 | 66.4% | 593 | 66.3% | 0 | 0.0% | 3 | 0.3% | | | | |
| 12 | 559 | 1008 | 70 | 12.5% | 127 | 12.6% | 100 | 17.9% | 188 | 18.7% | 385 | 68.9% | 687 | 68.2% | 4 | 0.7% | 6 | 0.6% | | | | |
| 13 | 452 | 895 | 62 | 13.7% | 135 | 15.1% | 89 | 19.7% | 192 | 21.5% | 298 | 65.9% | 563 | 62.9% | 3 | 0.7% | 7 | 0.8% | | | | |
| 14 | 720 | 1215 | 91 | 12.6% | 145 | 11.9% | 150 | 20.8% | 263 | 21.6% | 474 | 65.8% | 800 | 65.8% | 5 | 0.7% | 7 | 0.6% | | | | |
| 15 | 469 | 910 | 46 | 9.8% | 80 | 8.8% | 69 | 14.7% | 149 | 16.4% | 354 | 75.5% | 680 | 74.7% | 1 | 0.2% | 1 | 0.1% | | | | |
| 16 | 638 | 1092 | 64 | 10.0% | 156 | 14.3% | 85 | 13.3% | 148 | 13.6% | 489 | 76.6% | 787 | 72.1% | 0 | 0.0% | 1 | 0.1% | | | | |
| 17 | 504 | 912 | 62 | 12.3% | 101 | 11.1% | 119 | 23.6% | 217 | 23.8% | 317 | 62.9% | 587 | 64.4% | 6 | 1.2% | 7 | 0.8% | | | | |
| 18 | 442 | 878 | 71 | 16.1% | 134 | 15.3% | 71 | 16.1% | 152 | 17.3% | 298 | 67.4% | 590 | 67.2% | 2 | 0.5% | 2 | 0.2% | | | | |
| 20 | 418 | 864 | 58 | 13.9% | 124 | 14.4% | 80 | 19.1% | 176 | 20.4% | 278 | 66.5% | 560 | 64.8% | 2 | 0.5% | 4 | 0.5% | | | | |
| Subtotal | 5589 | 10491 | 730 | 13.1% | 1392 | 13.3% | 981 | 17.6% | 1893 | 18.1% | 4849 | 68.9% | 7154 | 68.2% | 29 | 0.5% | 47 | 0.4% | | | | |
| All Sections | 10805 | 20320 | 1404 | 13.0% | 2673 | 13.2% | 1881 | 17.4% | 3621 | 17.8% | 7478 | 69.2% | 13961 | 68.7% | 42 | 0.4% | 65 | 0.4% | | | | |
| Travel Boards | 164 | 307 | 47 | 28.7% | 86 | 28.0% | 44 | 26.8% | 82 | 26.7% | 73 | 44.5% | 139 | 45.3% | 0 | 0.0% | 0 | 0.0% | | | | |
| Administrative | 223 | 484 | 0 | 0.0% | 0 | 0.0% | 137 | 61.4% | 315 | 65.1% | 0 | 0.0% | 0 | 0.0% | 86 | 38.6% | 169 | 34.9% | 568 | 996 | 27 | 61 |
| Total BVA | 11192 | 21111 | 1451 | 13.0% | 2759 | 13.1% | 2062 | 18.4% | 4018 | 19.0% | 7551 | 67.5% | 14100 | 66.8% | 128 | 1.1% | 234 | 1.1% | 568 | 996 | 27 | 61 |

(SECDIS2Q.F88)
(4/12/88)

Attachment 5.4

BOARD OF VETERANS APPEALS
Dispositions by Sections
Evaluation Year Ending March 31, 1988

Revised May 2, 1988

| Section | Decisions Dispatched | Allowed Number | Allowed Percent | Remanded Number | Remanded Percent | Denied Number | Denied Percent | Other Number | Other Percent | Benefits Granted | Letter Recons. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Sep. Group I | | | | | | | | | | | |
| 1 | 1983 | 243 | 12.3% | 256 | 12.9% | 1479 | 74.6% | 5 | 0.3% | | |
| 2 | 1815 | 175 | 9.6% | 215 | 11.8% | 1415 | 78.0% | 10 | 0.6% | | |
| 4 | 2169 | 224 | 10.3% | 275 | 12.7% | 1665 | 76.8% | 5 | 0.2% | | |
| 5 | 2104 | 227 | 10.8% | 443 | 21.1% | 1430 | 68.0% | 4 | 0.2% | | |
| 6 | 2287 | 434 | 19.0% | 700 | 30.6% | 1150 | 50.3% | 3 | 0.1% | | |
| 8 | 1963 | 310 | 15.8% | 349 | 17.8% | 1301 | 66.3% | 3 | 0.2% | | |
| 10 | 2211 | 294 | 13.3% | 607 | 27.5% | 1306 | 59.1% | 4 | 0.2% | | |
| 11 | 2066 | 275 | 13.3% | 173 | 8.4% | 1611 | 78.0% | 7 | 0.3% | | |
| 19 | 2025 | 243 | 12.0% | 338 | 16.7% | 1442 | 71.2% | 2 | 0.1% | | |
| 21 | 1771 | 172 | 9.7% | 382 | 21.6% | 1213 | 68.5% | 4 | 0.2% | | |
| Subtotal | 20394 | 2597 | 12.7% | 3738 | 18.3% | 14012 | 68.7% | 47 | 0.2% | | |
| Sep. Group II | | | | | | | | | | | |
| 3 | 1805 | 250 | 13.9% | 204 | 11.3% | 1347 | 74.6% | 4 | 0.2% | | |
| 7 | 1883 | 260 | 13.8% | 326 | 17.3% | 1279 | 67.9% | 18 | 1.0% | | |
| 9 | 1878 | 259 | 13.8% | 364 | 19.4% | 1250 | 66.6% | 5 | 0.3% | | |
| 12 | 2037 | 233 | 11.4% | 437 | 21.5% | 1350 | 66.3% | 17 | 0.8% | | |
| 13 | 1893 | 297 | 15.7% | 415 | 21.9% | 1175 | 62.1% | 6 | 0.3% | | |
| 14 | 2298 | 278 | 12.1% | 520 | 22.6% | 1493 | 65.0% | 7 | 0.3% | | |
| 15 | 1910 | 170 | 8.9% | 271 | 14.2% | 1463 | 76.6% | 6 | 0.3% | | |
| 16 | 2114 | 333 | 15.8% | 303 | 14.3% | 1474 | 69.7% | 4 | 0.2% | | |
| 17 | 1893 | 228 | 12.0% | 525 | 27.7% | 1131 | 59.7% | 9 | 0.5% | | |
| 18 | 1894 | 270 | 14.3% | 307 | 16.2% | 1313 | 69.3% | 4 | 0.2% | | |
| 20 | 1874 | 268 | 14.3% | 415 | 22.1% | 1185 | 63.2% | 6 | 0.3% | | |
| Subtotal | 21479 | 2846 | 13.3% | 4087 | 19.0% | 14460 | 67.3% | 86 | 0.4% | | |
| All Sections | 41873 | 5443 | 13.0% | 7825 | 18.7% | 28472 | 68.0% | 133 | 0.3% | | |
| Travel Boards | 672 | 208 | 31.0% | 171 | 25.4% | 293 | 43.6% | 0 | 0.0% | | |
| Administrative | 1110 | 0 | 0.0% | 711 | 64.1% | 0 | 0.0% | 399 | 35.9% | 1903 | 129 |
| Total BVA | 43655 | 5651 | 12.9% | 8707 | 19.9% | 28765 | 65.9% | 532 | 1.2% | 1903 | 129 |

(SECDISP.E88)
(5/2/88)

BOARD OF VETERANS APPEALS
Dispositions by Sections
Quarter Ending June 30, 1988 and FY 1988 Cumulative

| Section | Decisions Dispatched Qtr. | Dispatched Cum. | --Decisions Allowed-- Quarter No. | % | Cumulative No. | % | -Decisions Remanded-- Quarter No. | % | Cumulative No. | % | --Decisions Denied--- Quarter No. | % | Cumulative No. | % | Other Dispositions Quarter No. | % | Cumulative No. | % | Benefits Granted Qtr | Cum | Letter Recons. Qtr | Cum |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Appellate Group I | | | | | | | | | | | | | | | | | | | | | | |
| 1 | 471 | 1412 | 59 | 12.5% | 170 | 12.0% | 57 | 12.1% | 187 | 13.2% | 355 | 75.4% | 1055 | 74.7% | 0 | 0.0% | 0 | 0.0% | | | | |
| 2 | 480 | 1354 | 66 | 13.8% | 161 | 11.9% | 59 | 12.3% | 166 | 12.3% | 352 | 73.3% | 1018 | 75.2% | 3 | 0.6% | 9 | 0.7% | | | | |
| 4 | 563 | 1755 | 47 | 8.3% | 158 | 9.0% | 96 | 17.1% | 234 | 13.3% | 415 | 73.7% | 1356 | 77.3% | 5 | 0.9% | 7 | 0.4% | | | | |
| 5 | 477 | 1499 | 53 | 11.1% | 171 | 11.4% | 77 | 16.1% | 273 | 18.2% | 347 | 72.7% | 1053 | 70.2% | 0 | 0.0% | 2 | 0.1% | | | | |
| 6 | 462 | 1371 | 115 | 24.9% | 329 | 24.0% | 103 | 22.3% | 379 | 27.6% | 244 | 52.8% | 662 | 48.3% | 0 | 0.0% | 1 | 0.1% | | | | |
| 8 | 465 | 1426 | 79 | 17.0% | 240 | 16.8% | 71 | 15.3% | 237 | 16.6% | 312 | 67.1% | 945 | 66.3% | 3 | 0.6% | 4 | 0.3% | | | | |
| 10 | 366 | 1465 | 47 | 12.8% | 193 | 13.2% | 109 | 29.8% | 401 | 27.4% | 209 | 57.1% | 868 | 59.2% | 1 | 0.3% | 3 | 0.2% | | | | |
| 11 | 481 | 1529 | 92 | 19.1% | 236 | 15.4% | 84 | 17.5% | 185 | 12.1% | 304 | 63.2% | 1106 | 72.3% | 1 | 0.2% | 2 | 0.1% | | | | |
| 19 | 481 | 1470 | 42 | 8.7% | 140 | 9.5% | 39 | 8.1% | 191 | 13.0% | 398 | 82.7% | 1136 | 77.3% | 2 | 0.4% | 3 | 0.2% | | | | |
| 21 | 485 | 1279 | 78 | 16.1% | 161 | 12.6% | 98 | 20.2% | 262 | 20.5% | 309 | 63.7% | 854 | 66.8% | 0 | 0.0% | 2 | 0.2% | | | | |
| Subtotal | 4731 | 14560 | 678 | 14.3% | 1959 | 13.5% | 793 | 16.8% | 2515 | 17.3% | 3245 | 68.6% | 10053 | 69.0% | 15 | 0.3% | 33 | 0.2% | | | | |
| Appellate Group II | | | | | | | | | | | | | | | | | | | | | | |
| 3 | 436 | 1292 | 54 | 12.4% | 165 | 12.8% | 77 | 17.7% | 169 | 13.1% | 304 | 69.7% | 955 | 73.9% | 1 | 0.2% | 3 | 0.2% | | | | |
| 7 | 387 | 1354 | 50 | 12.9% | 188 | 13.9% | 64 | 16.5% | 229 | 16.9% | 270 | 69.8% | 927 | 68.5% | 3 | 0.8% | 10 | 0.7% | | | | |
| 9 | 440 | 1334 | 66 | 15.0% | 207 | 15.5% | 79 | 18.0% | 236 | 17.7% | 295 | 67.0% | 888 | 66.6% | 0 | 0.0% | 3 | 0.2% | | | | |
| 12 | 483 | 1491 | 75 | 15.5% | 202 | 13.5% | 125 | 25.9% | 313 | 21.0% | 283 | 58.6% | 970 | 65.1% | 0 | 0.0% | 6 | 0.4% | | | | |
| 13 | 388 | 1283 | 50 | 12.9% | 185 | 14.4% | 85 | 21.9% | 277 | 21.6% | 253 | 65.2% | 814 | 63.4% | 0 | 0.0% | 7 | 0.5% | | | | |
| 14 | 441 | 1656 | 49 | 11.1% | 194 | 11.7% | 100 | 22.7% | 363 | 21.9% | 290 | 65.8% | 1090 | 65.8% | 2 | 0.5% | 9 | 0.5% | | | | |
| 15 | 419 | 1329 | 64 | 15.3% | 144 | 10.8% | 64 | 15.3% | 213 | 16.0% | 290 | 69.2% | 970 | 73.0% | 1 | 0.2% | 2 | 0.2% | | | | |
| 16 | 538 | 1630 | 58 | 10.8% | 214 | 13.1% | 84 | 15.6% | 232 | 14.2% | 393 | 73.0% | 1180 | 72.4% | 3 | 0.6% | 4 | 0.2% | | | | |
| 17 | 440 | 1352 | 40 | 9.1% | 141 | 10.4% | 115 | 26.1% | 332 | 24.6% | 281 | 63.9% | 868 | 64.2% | 4 | 0.9% | 11 | 0.8% | | | | |
| 18 | 455 | 1333 | 64 | 14.1% | 198 | 14.9% | 77 | 16.9% | 229 | 17.2% | 313 | 68.8% | 903 | 67.7% | 1 | 0.2% | 3 | 0.2% | | | | |
| 20 | 449 | 1313 | 65 | 14.5% | 189 | 14.4% | 84 | 18.7% | 260 | 19.8% | 299 | 66.6% | 859 | 65.4% | 1 | 0.2% | 5 | 0.4% | | | | |
| Subtotal | 4876 | 15367 | 635 | 13.0% | 2027 | 13.2% | 954 | 19.6% | 2853 | 18.6% | 3271 | 67.1% | 10424 | 67.8% | 16 | 0.3% | 63 | 0.4% | | | | |
| All Sections | 9607 | 29927 | 1313 | 13.7% | 3986 | 13.3% | 1747 | 18.2% | 5368 | 17.9% | 6516 | 67.8% | 20477 | 68.4% | 31 | 0.3% | 96 | 0.3% | | | | |
| Travel Boards | 212 | 520 | 55 | 25.9% | 141 | 27.1% | 43 | 20.3% | 125 | 24.0% | 113 | 53.3% | 252 | 48.5% | 1 | 0.5% | 2 | 0.4% | | | | |
| Administrative | 216 | 700 | 0 | 0.0% | 0 | 0.0% | 153 | 70.8% | 468 | 66.9% | 0 | 0.0% | 0 | 0.0% | 63 | 29.2% | 232 | 33.1% | 265 | 1261 | 22 | 82 |
| Total BVA | 10035 | 31147 | 1368 | 13.6% | 4127 | 13.3% | 1943 | 19.4% | 5961 | 19.1% | 6629 | 66.1% | 20729 | 66.6% | 95 | 0.9% | 330 | 1.1% | 265 | 1261 | 22 | 82 |

(SF:DIS30.F88)
(5/3/88)

Attachment 5.6

WHITE PAPER

BOARD OF VETERANS APPEALS

IMPACT OF PRODUCTIVITY UPON QUALITY

Questions have recently arisen regarding the impact that the Board of Veterans Appeals' long standing emphasis upon productivity may be having upon the "quality" of our appellate decisions. During the recent BVA oversight hearing held on October 6, 1987 by the Compensation, Pension and Insurance Subcommittee of the House Veterans' Affairs Committee, this issue was raised in more than one context after having been introduced in the prepared testimony of the Vietnam Veterans of America. We were criticized for basing our performance awards for Board Members and staff attorneys upon productivity; for establishing production "quotas" for Board Sections; and for countenancing improprieties in case workload distribution to satisfy productivity system requirements. The qualitative impact suggested at the hearing was that, ultimately, veterans are the ones who will suffer as a result of our excessive emphasis on productivity.

We feel that, first and foremost, distinctions should clearly be made as to what constitutes "quality" in reference to the VA's appellate program. Quality exists in more than one dimension. Given a predefined, limited level of available resources, a major role of management is to prioritize the various dimensions of quality and to realistically decide which qualitative aspects of a program are indispensable and which are nice to have. The qualitative aspects of the VA appellate program that we regard as indispensable are the ultimate results of BVA final decisions, i.e., whether a case is allowed or denied. We do not feel that there is room for compromise relative to quality at this level, and we do not feel that our productivity emphasis has adversely affected decision quality in this sense.

We have attempted to perform some examinations of the relationships between productivity and our allowance and denial rates. Regardless of whether the productivity comparison was at the individual attorney level, the Board Section level, or the overall BVA level, we did not find any correlation between periods of high productivity and either low allowance rates or high denial rates (a broad summary of these analyses has been attached for information purposes). There is literally no evidence that we have found or that has been brought to our attention to show that high productivity at the BVA is contrary to the interests of veterans. It is somewhat ironic, in fact, to note that some of the same critics who have faulted us for our productivity emphasis have simultaneously criticized us for being insufficiently timely in our handling of appeals. Again, this is an essential role of management; to be able to view the VA appellate program in the broadest perspective and to then determine an appropriate balance between productivity/timeliness imperatives and the requirements for review, research, and thoughtful deliberation on the part of both attorneys and Board Members.

There is a second form of quality that we feel is an essential component of an effective VA appellate program's structure. Quality in this context is focused less upon the ultimate results of an appellate decision and more upon the processes leading to those results and the manner in which the results are presented. The efforts that we have been directing to our own quality initiative in the recent past have attempted to address this dimension of quality. Some of the points we have strived for in our quality initiative have included: rigorous attention to due process requirements; assurance that all decisions are well-reasoned; close attention to the caliber of decision writing to ensure that the Board's findings are conveyed clearly and effectively; intensified review of all appeals within certain categories which, due to the topical content, may be subject to greater public scrutiny (e.g., ionizing radiation appeals, Agent Orange appeals, etc..); and attention to maintaining a certain level of consistency among decisions and Board Sections, without disrupting the vital decision-making independence of the Board Members. We believe that our efforts over the past two years to upgrade the Board's quality level in these areas have met with positive results. The formal statements that both the DAV and the PVA recently submitted to the House Veterans' Affairs Committee for inclusion in the record of the BVA oversight hearing specifically commented upon our quality review program and provided their support for the initiative. While we would consider any reduction of attention to these elements of quality to be a step in the wrong direction, we believe that the category of quality that we first described (i.e., quality as manifested in the accuracy of decision-making) is clearly more significant to the VA appellate program.

The first data set provided below consists of BVA final decisions produced from FY 1982 through FY 1987. "Final decisions" include all decisions dispatched during the indicated timeframes, with the exception of remands. By analyzing decision production in this manner, we have attempted to concentrate on the Board's final allowance and denial rates to determine whether there is any obvious correlation between periods of high production and adverse decision findings from the perspective of VA appellants. The second data set is a summary of the average BVA attorney productivity ratings assessed during evaluation years 1982 through 1987. Evaluation year cycles run from April 1 through March 31; consequently there are some acknowledged deficiencies associated with any comparisons of these two data sets. However, we believe that they are adequate for the purpose of a broad analysis of trend. Fiscal Years 1984 and 1985 represent the peak raw production periods of the BVA's recent past, and our greatest production pressures at both the BVA organizational level and the individual attorney level occurred during the years of 1983 through 1985. We do not believe that any analysis of these data provided below could suggest that there is a correlation between high BVA production and adverse decision findings as indicated through either low final allowance rates or high final denial rates.

| | FY 82 | | FY 83 | | FY 84 | | FY 85 | | FY 86 | | FY 87 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % |
| Allowed | 4,651 | 15.3% | 5,271 | 16.2% | 6,094 | 16.3% | 6,002 | 15.8% | 5,361 | 15.7% | 5,270 | 16.1% |
| Denied | 25,395 | 83.7% | 26,969 | 82.7% | 30,991 | 82.7% | 31,383 | 82.9% | 28,219 | 82.7% | 26,894 | 82.2% |
| Other Final Dispositions | 294 | 1.0% | 379 | 1.2% | 404 | 1.1% | 493 | 1.3% | 526 | 1.5% | 568 | 1.7% |
| Total Final Dispositions | 30,340 | 100.0% | 32,619 | 100.0% | 37,489 | 100.0% | 37,878 | 100.0% | 34,106 | 100.0% | 32,732 | 100.0% |
| Remand Decisions | 5,418 | | 5,972 | | 6,575 | | 7,395 | | 7,897 | | 8,564 | |
| Total BVA Dispositions | 35,758 | | 38,591 | | 44,064 | | 45,273 | | 42,003 | | 41,296 | |

| Average Attorney Productivity Scores | Evaluation Year Ending 3/31/82 | Evaluation Year Ending 3/31/83 | Evaluation Year Ending 3/31/84 | Evaluation Year Ending 3/31/85 | Evaluation Year Ending 3/31/86 | Evaluation Year Ending 3/31/87 |
|---|---|---|---|---|---|---|
| GS-14 Attorneys | 120.0% | 136.0% | 128.9% | 128.1% | 133.3% | 117.1% |
| GS-13 Attorneys | 111.6% | 116.3% | 127.5% | 117.3% | 109.7% | 113.1% |
| GS-12 Attorneys | 98.7% | 114.1% | 113.8% | 107.7% | 129.7% | 112.2% |
| GS-11 Attorneys | 109.4% | 112.9% | 101.4% | 111.7% | 102.4% | 95.6% |
| GS-09 Attorneys | 97.5% | 102.4% | 98.5% | 105.0% | 121.8% | 66.3% |
| All Attorneys | 109.8% | 120.7% | 118.3% | 116.4% | 121.8% | 112.3% |

Office of the
Administrator
of Veterans Affairs

Washington DC 20420

Veterans
Administration

SEP 20 1988

In Reply Refer To:

Honorable G. V. (Sonny) Montgomery
Chairman, Committee on Veterans'
Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find the Agency's response to a question which you forwarded on behalf of Congressman McEwen for the August 11, 1988, hearing on the Board of Veterans' Appeals. Thank you for the opportunity to provide this additional information for the record.

Sincerely,

THOMAS K. TURNAGE
Administrator

Enclosure

cc: Honorable Bob McEwen

RESPONSE TO QUESTIONS OF
CONGRESSMAN BOB MCEWEN OF OHIO
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE HEARING
OF AUGUST 11, 1988

*1. Is there any prospect that all 21 board sections will be housed in a single building anytime soon, and would you agree that having some sections in different buildings results in needless administrative duplication?*

Currently, 14 Sections of the Board are located in the Lafayette Building across the street from the Veterans Administration Central Office. Recently, 7 Sections were relocated to the Riggs Building on Vermont Avenue approximately three blocks away from the Lafayette Building. The Sections were relocated from the Shoreham Building because that structure did not meet the minimum standards established by the General Services Administration. The Riggs Building, however, provides significantly improved workspace. It has also been necessary to move the offices of several service organization groups from the Lafayette Building to the Riggs Building. We are aware that some service organizations have expressed concern over being moved from their previous offices. Any relocation is somewhat traumatic to those being displaced, and we are doing all we can to mitigate the impact of this relocation.

It is clearly to the Board's advantage to have all our offices in the same location; however, some locations which may be spacious enough for the entire Board and the affected service organizations are not as desirable as our present arrangement. Accessibility to good public transportation for the appellant is a key factor, and some individuals believe that proximity to the VA Central Office is important.

I believe that the preferred solution is to unite all offices in the Lafayette Building, and there is an indication that we may be able to obtain the needed space in the future when the Administrative Office of the United States Courts vacates the premises. Unfortunately, this could not take place for several years and would be subject to GSA approval. It appears as if our current arrangement will continue for the immediate, foreseeable future, although we shall continue to consider desirable alternatives.

Our attempts to lessen the impact of the relocation to the Riggs Building and make those arrangements more palatable lead me to my response to the second part of the question. For the convenience of the physicians, attorneys and service organization representatives in the Riggs Building, we have established a small medical library on the premises so that, in most cases, these individuals need not return to the Research Center in the Lafayette Building to conduct medical research. With the advice of the BVA physicians assigned to those Sections in the Riggs Building, we have ordered additional medical books for availability in that location. We have also established a skeleton Hearing Section so that hearings scheduled for claimants represented by the service organizations housed in the Riggs Building may be held at that location for the convenience of the representatives and claimants. We have installed word processing facilities in the Riggs Building for the use of BVA attorneys and the service organizations and in order that proposed decisions and informal hearing presentations may be telecommunicated directly from our transcriptionists in Wilkes Barre to the Riggs Building. While it is true that this results in some administrative duplication, we believe that it is minimal.

Veterans Administration policy is to consolidate organizational elements in contiguous office space whenever possible. This policy is cited in the "Comprehensive Assessment of VA Space in the National Capital Region," approved by the Administrator on May 9, 1988. In addition, the VA has initiated a proposed "Memorandum of Understanding" with GSA to improve and consolidate the housing of the VA in the National Capital Region, with emphasis on the VA Central Office and Lafayette Buildings.

Please be assured that we will continue our efforts to lessen any negative impact on the personnel of the displaced Sections and service organizations, and we shall remain alert to opportunities to reunite all the offices of the BVA under one roof.

89-279 (160)